Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

(T.D. 90–41)

REVOCATION OF CORPORATE BROKER LICENSE NO. 11455 D.A.T.E. INTERNATIONAL, INC.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on April 21, 1990, pursuant to section 641(b)(5), Tariff Act of 1930, as amended (19 U.S.C. 1641(b)(5)), the corporate license (no. 11455) for D.A.T.E. International, Inc., to conduct Customs business was revoked by action of law.

Dated: May 9, 1990.

WILLIAM LEUBKERT,
Acting Director,
Office of Trade Operations.

[Published in the Federal Register, May 23, 1990 (55 FR 21298)]

(T.D. 90–42)

CLARIFICATION OF ISSUES REGARDING "SHELTER OPERATIONS" ALONG THE MEXICAN BORDER

This document is issued in an effort to assure uniformity of treatment to several areas regarding "shelter" operations along the U.S./Mexican border. Merchandise assembled in Mexico pursuant to these operations is being entered under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS) (formerly item 807.00, Tariff Schedules of the United States (TSUS).

A "shelter" operation may involve a U.S. corporation which is established for the sole purpose of facilitating assembly operations for third party clients in the U.S. The U.S. shelter company establishes a related or makes arrangements with an unrelated Mexican company to perform the assembly operations, arrange for the Mexican labor, receive orders from third-party clients (unrelated), and facili-

tate the entry of the assembled merchandise. The third-party U.S. clients normally provide, without charge, the materials (components) to be assembled, the production equipment to be used, and production supervision. The U.S. shelter corporation usually is the importer of record, and submits to Customs an "invoice" between the related and unrelated Mexican assembler and the shelter. The invoice between the shelter company and the unrelated third-party clients, which includes the shelter's markup, usually is not submitted to Customs. There may be many variations of the above.

In an effort to assist Customs officials and the public, we have addressed a number of questions raised regarding these concerns.

Do U.S. shelter corporations have the right to be importers of record under 19 U.S.C. 1484 (and Customs Directive 3530–02 dated November 6, 1984)?

U.S. shelter corporations have the right to make entry if they are the owner or purchaser of the finished articles, or if they are a licensed customhouse broker duly appointed by the owner, purchaser, or consignee of the merchandise. A shelter corporation not licensed as a customhouse broker would be precluded from acting as importer of record, where it was engaged by the third-party U.S. client for the purpose of arranging the transportation and assembly of the articles in Mexico, and where it had no ownership interest in the finished goods. The Customs Service has the authority to refuse to accept entries from unqualified persons.

Where U.S. shelter companies go bankrupt or otherwise dissolve and subsequently reincorporate under a new name, to what extent can the new corporation be held liable for duties due on importations entered by the previous corporation?

New corporations cannot be held liable for the duties owed by dissolved or bankrupt corporations, unless it is shown that the new corporation agreed to assume the debts and liabilities of the defunct corporation, there was a de facto merger or consolidation of the two corporations, the new corporation was a "mere continuation" of the old corporation, or the arrangement was entered into fraudulently as a means of escaping liability. In the last scenario, there may be recourse against individual officers of the new corporation who were also officers of the defunct corporation and who were instrumental in perpetrating the fraud.

Regarding the scenario in issue two, what ability does a Customs district director have to raise the amount of the applicable entry or continuous bond covering merchandise entered by the new corporation to protect the revenue?

The district director has authority under 19 U.S.C. 1623 and 19 CFR 113.13 to raise the bond amount on a particular entry or for all future entries.

If the U.S. shelter corporations have the right to make entry, to what extent can the unrelated third-party U.S. clients be required to provide Customs with access to their records concerning the shelter operation?

The Customs Service has the right to look at records that pertain to the importation of merchandise, or those documents that substantiate the correctness of information contained in documents legally required in connection with the entry of merchandise. The authority to examine these records is addressed in19 U.S.C. 1508.

Is transaction value still the primary basis of appraisement under the circumstances presented above?

In the circumstances presented, 19 CFR 152.103(a)(3) is particularly relevant. That subsection provides:

> "the price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the value of the components and required adjustments to form the basis for the transaction value."

This subsection is applicable notwithstanding the involvement of the shelter. What is important in this regard is that the conditions of the regulatory provision have been met. Accordingly, if the assembler's charges represent the complete assembly cost, then this provision is applicable and transaction value will consist of the value of the components and required adjustments as well as an amount for the assembly of the imported merchandise.

In those situations where no assembly operation occurs, 19 CFR 152.103(a)(3) would be inapplicable.

What is meant by the term "assembly"?

Pursuant to section 19 CFR 10.12(b), "assembly" is defined as the fitting or joining together of fabricated components. As set forth in 19 CFR 152.103(a)(3) the term "assembly" refers to imported merchandise entered under subheading 9802.00.80, HTSUS.

Does it matter whether the U.S. client or the shelter supply the materials or components to the assembler?

In the context of 19 CFR 152.103(a)(3), the materials and components are treated as assists under the authority of section 402(h)(1)(A) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a(b)), regardless of which party supplies the materials or components.

Is a profit required to be included in the assembly charge due to the fact that the shelter and the assembler are related?

As the shelter and the assembler are related, the transaction value must be acceptable under section 402(b)(2)(B) of the TAA and 19 CFR 152.103(j)(2)(i).

Section 402(b)(2)(B), provides that the transaction value of the merchandise may serve as the basis of appraisement in related party transactions if:

> * * * an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable; or the transaction value of the imported merchandise closely approximates one of the test values.

In determining whether the relationship between the parties influenced the price of the merchandise, the Statement of Administrative Action and 19 CFR 152.103(j)(2)(i) provide that if it is shown that the buyer and seller, although related, bought from and sold to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship, and transaction value would be accepted. If the price is determined in a manner which is consistent with the normal pricing practice of the industry in question, or with the way the seller deals with unrelated buyers, then it is considered not to have been influenced by the relationship of the parties.

Under the facts presented, the key point is whether the price has been determined in a manner consistent with the industry in question. In this regard, the industry in question could be the consumer electronics industry, the wearing apparel industry or whatever industry is applicable under the circumstances. Therefore, for example, if none of the assemblers of consumer electronic products in the country of exportation include a profit in their assembly charges, then an appraised value without any profit included could be entirely appropriate.

Under what circumstances would a basis of appraisement other than transaction value be appropriate?

1. When the provisions of 19 CFR 152.103(a)(3) have not been met.
2. Where there is a lack of consistency in the pricing practices in the industry in question as in the preceding paragraph.

Can warehousing charges incurred during the transportation of the assist be included in the value of the components?

Under authority of 19 CFR 152.103(d)(2) the value of the assist will include transportation costs to the place of production. Consequently, only those warehousing costs which are incidental to the transportation of the goods would be included in the value of the assist.

Dated: May 21, 1990.

R. Rosettie,
(for Samuel H. Banks,
Assistant Commissioner,
Office of Commercial Operations.)

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 21, 1990.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 90-65)

Carriers: The applicability of coastwise laws to a U.S.-built coastwise qualified documented vessel owned by a foreign corporation which has obtained a Certificate of Compliance under the Bowaters Act.

Date: October 2, 1989
File: HQ 110323
VES-3-17/VES-3-24 CO:R:P:C 110323 PH
Category: Carriers

MR. GEORGE ROBERTS
DISTRICT DIRECTOR
UNITED STATES CUSTOMS SERVICE
Honolulu, Hawaii 96806

Re: Applicability of the coastwise laws (in this case, 46 U.S.C. App. 883, the Jones Act, and/or 883-1, the Bowaters Act) to a vessel owned by a United States corporation which is the subsidiary of a foreign-owned corporation and to vessels chartered to a United States corporation which is the subsidiary of a foreign-owned corporation.

DEAR MR. ROBERTS:

This is in response to your memorandum of June 15, 1989 (File: FOR-HO CWG), concerning the applicability of the coastwise laws to the use by Pacific Resources, Inc., and its subsidiaries of certain vessels to move petroleum products within the State of Hawaii.

With your letter you forwarded materials concerning the corporate structure of the owners of the vessels and the documentation of the vessels in question.

Facts:

According to the materials you submitted, Broken Hill Proprietary Company, Ltd. (BHP), is an Australian corporation. BHP, through a wholly owned Hawaiian subsidiary, purchased Pacific Resources, Inc. (PRI), a Hawaiian corporation. After this transaction PRI became an indirect wholly owned subsidiary of BHP. Enerco, Inc. (Enerco), and Gasco, Inc. (Gasco), are Hawaiian corporations which are wholly owned by PRI.

The *Gasco Huki Kai I* is a non-self-propelled United States-built vessel (1,256 gross tons, 1,256 net tons) which has been documented by the Coast Guard for the coastwise trade. The vessel was formerly owned by Gasco and now is owned by Enerco. The United States Coast Guard on February 22, 1989, issued Certificates of Compliance with 46 U.S.C. App. 883–1 to PRI, Gasco, and Enerco. Under the Certificate of Compliance issued to Enerco, that corporation is authorized to operate vessels in the coastwise trade subject to the limitations of section 883–1. Under the Certificate of Compliance issued to Gasco, Enerco is authorized to operate vessels in the coastwise trade as a service for Gasco, subject to the limitations of section 883–1. Under the Certificate of Compliance issued to PRI, Enerco is authorized to operate vessels in the coastwise trade as a service for PRI, subject to the limitations of section 883–1.

PRI and its subsidiaries also owned four other United States-built coastwise-documented vessels before the purchase of PRI by BHP. These vessels, the *Niau, Naupaka, Holo Kai,* and *Hui Mana*, were sold by PRI and its subsidiaries to the Bank of Hawaii. The first two of these vessels are self-propelled and the latter two are non-self-propelled. The respective gross and net tonnages of the vessels are: *Niau*—89 gross tons, 40 net tons; *Naupaka*—96 gross tons, 65 net tons; *Holo Kai*—1,770 gross tons, 1,770 net tons; and *Mui Mana*—2,299 gross tons, 1,101 net tons).

The Bank of Hawaii chartered the vessels under a charter agreement described as a bareboat charter to Tow Boat Services & Management, Inc. (Tow Boat). Both the Bank of Hawaii and Tow Boat are United States citizens within the meaning of 46 U.S.C. App. 802. Tow Boat chartered the vessels under charter agreements described as time charters to Hawaiian Independent Refinery, Inc. (HIRI). HIRI is a wholly owned subsidiary of PRI. The Maritime Administration approved the charters of the *Holo Kai* and *Hui Mana* under 46 U.S.C. App. 808 and 835. The Maritime Administration held that specific administrative approval of the charters of the *Niau* and *Naupaka* was not necessary because "charter approval [for those vessels] is granted on the face of 46 CFR 221.17(a)."

Issues:

1. May a United States-built, coastwise-documented vessel owned by a Bowaters Act corporation be used in the coastwise trade?

2. May United States-built, coastwise-documented vessels owned by a United States citizen corporation be used in the coastwise trade when they are bareboat chartered to a second United States citizen corporation which time charters them, with Maritime Administration approval, to a foreign owned corporation?

Law and Analysis:

Section 27 of the Act of June 5, 1920, as amended (41 Stat. 999; 46 U.S.C. App. 883, often called the Jones Act), provides, in pertinent part, that:

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury, or the actual cost of the transportation, whichever is greater, to be recovered from any consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States * * * embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States * * *.

Section 4370 of the Revised Statutes, as amended (R.S. 4370; 46 U.S.C. App. 316(a), the coastwise towing statute), prohibits the towing of any vessel, other than a vessel in distress, by a vessel not documented under the United States flag to engage in the coastwise or Great Lakes trade between ports or places in the United States embraced within the coastwise laws, either directly or by way of a foreign port or place, or for any part of such towing, or such towing between points in a harbor of the United States.

Under section 2 of the Act of September 7, 1916, as amended (39 Stat. 729; 46 U.S.C. App. 802), "* * * in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum."

Section 9 of the Act of September 7, 1916, as amended (39 Stat. 730; 46 U.S.C. App. 808) (see also 46 U.S.C. App. 835), restricts the transfer of United States-owned and documented vessels. Under this statute—

* * * * * * *

> [With an exception inapplicable in this case], it shall be unlawful, without the approval of the Secretary of Commerce, to sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or

> transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.
>
> * * * * * * *

The regulations of the Maritime Administration issued under this provision are found in Part 221 of title 46 of the Code of Federal Regulations (46 CFR Part 221). Section 221.17 of these regulations (46 CFR 221.17), was amended by an interim final rule published in the *Federal Register* on February 2, 1989 (54 FR 5382), and further amended by a notice of correction in the *Federal Register* on February 27, 1989 (54 FR 8195). Under the amended section 221.17 the Maritime Administration grants prior approval of charters and certain other forms of transfers of interest or control of certain kinds of documented vessels owned by citizens of the United States. The vessels to which this provision applies are self-propelled vessels under 1,000 gross tons, vessels operating on inland lakes or waters from which there is no navigable exit, and non-self-propelled vessels under 1,000 tons, excluding *Lash* and *Seabee* type vessels. It is specifically provided that the provision does not apply when the transferee of a vessel is a corporation holding a Certificate of Compliance under the Bowaters Act.

The Act of September 2, 1958 (72 Stat. 1736, often called the Bowaters Act), titled "An Act to amend section 27 of the Merchant Marine Act of 1920," added a new section 27A immediately following section 27. This Act provides, in pertinent part, that:

> Notwithstanding any other provision of law, a corporation incorporated under the laws of the United States * * * shall be deemed to be a citizen of the United States for the purposes of and within the meaning of that term as used in sections 316, 808, 835 and 883 of this title, and the laws relating to the documentation of vessels, if it is established by a certificate filed with the Secretary of the Treasury [now the Coast Guard] * * * that [certain conditions relating to the corporation are satisfied] but no vessel owned by any such corporation shall engage in the fisheries or in the transportation of merchandise or passengers for hire between points in the United States * * * embraced within the coastwise laws, except as a service for a parent or subsidiary corporation and except when such vessel is under demise or bareboat charter at prevailing rates for use otherwise than in the domestic noncontiguous trades from any such corporation to a common or contract carrier subject to chapter 12 of Title 49, which otherwise qualifies as a citizen under section 802 of this title, and which is not connected, directly or indirectly, by way or ownership or control with such corporation.
>
> * * * * * * *

Vessels built in the United States and owned by a corporation meeting the conditions hereof which are non-self-propelled or which, if self-propelled, are of less than five hundred gross tons shall be entitled to documentation under the laws of the United States, and except as restricted by this section, shall be entitled to engage in the coastwise trade and, together with their owners of masters, shall be entitled to all the other benefits and privileges and shall be subject to the same requirements, penalties, and forfeitures as may be applicable in the case of vessels built in the United States and otherwise documented or exempt from documentation under the laws of the United States.

* * * * * * *

Under the Bowaters Act, a United States-built vessel documented in the United States pursuant to that law may not transport merchandise or passengers "*for hire*" between points embraced within the coastwise laws, with certain exceptions set forth in that Act. Transportation "for hire" has been defined as requiring "compensation by a charge, fare, rate, or some other plan, and connot[ing] a business operation." (See, *Brockway* v. *Travelers Insurance Co.*, 107 Wis. 2d 636, 321 N.W. 2d 332, 333 (1982); see also, definition of "hire" in *Webster's Third New International Dictionary of the English Language, Unabridged*, p. 1072.) Transportation for hire, within the meaning of the Bowaters Act, does not include transportation of merchandise owned by the owner of the transporting vessel (see discussion of legislative history of the Bowaters Act and applicable court decisions with regard to this issue in our ruling 110064, dated March 17, 1989).

On the basis of the foregoing the *Gasco Huki Kai I* may be used in the coastwise trade subject to the limitations in the Bowaters Act. That is, it may be used on a non-"for hire" basis by the owner (Enerco) (i.e., generally, to transport cargo owned by the owner) or as a service, even if on a "for hire" basis, for the owner's subsidiary or parent corporations which have obtained Bowaters Act Certificates of Compliance (Gasco and PRI). Although probably not at issue in this case, the vessel may also be used on a "for hire" basis if under bareboat charter to a United States citizen (as defined in 46 U.S.C. App. 802) when the conditions set forth in the Bowaters Act for this exception are met.

The other four vessels under consideration were built in the United States and are documented for the coastwise trade. The vessels are owned by a United States citizen corporation meeting the requirements of 46 U.S.C. App. 802 and are bareboat chartered by that corporation to another such Untied States citizen corporation. They are time chartered by the latter corporation to a foreign-owned corporation. The Maritime Administration has approved the charter of the vessels to the foreign-owned corporation as required in 46 U.S.C. App. 808.

It is the position of the Customs Service that coastwise-qualified vessels are not in violation of the coastwise laws when they are chartered to non-United States citizens *if* the charter is approved by the Maritime Administration (see letters 101589, dated April 10, 1975; 102710, dated April 5, 1977; 102743, dated April 5, 1977; and 105702, dated July 13, 1982). The *Niau, Naupaka, Holo Kai,* and *Hui Mana* may be used in the coastwise trade, subject to the conditions under which approval of their charters was granted by the Maritime Administration.

Holdings:

1. The United States-built, coastwise-documented vessel under consideration which is owned by a Bowaters Act corporation may be used in the coastwise trade, subject to the limitations in the Bowaters Act (i.e., it may be used on a non-"for hire" basis by the owner, as a service for the owner's subsidiary or parent corporations which have obtained Bowaters Act Certificates of Compliance, or as otherwise permitted by the Bowaters Act).

2. United States-built, coastwise-documented vessels owned by a United States citizen corporation may be used in the coastwise trade when they are bareboat chartered to a second United States citizen corporation which time charters them, with Maritime Administration approval, to a foreign owned corporation, provided that their use meets the conditions under which approval of the charters was granted by the Maritime Administration.

Thank you for taking note of this matter and bringing it to our attention. Please feel free to call upon Mr. Paul Hegland of my staff (202–566–5706) if you have any further questions.

(C.S.D. 90–66)

Classification: The applicability of subheading 9801.00.10, HTSUSA, to certain parts or components packaged in Mexico with assembled electric garage door openers.

Date: March 19, 1990
File: HQ 555378
CLA-2 CO:R:C:V 555378 GRV
Category: Classification
Tariff No.: 9801.00.10

District Director of Customs
Nogales, Arizona 85621

Re: Internal Advice Request No. 63/87; applicability of duty-free treatment under HTSUS subheading 9801.00.10 to various parts of U.S.-origin packaged abroad with electric garage door openers and returned to the U.S.

DEAR SIR:

This is in response to your letter of September 16, 1987, forwarding a request for internal advice initiated by the Chamberlain Group, Inc. ("importer"), regarding the applicability of subheading 9801.00.10, Harmonized Tariff Schedule of the United States (HTSUS) (formerly item 800.00, Tariff Schedules of the United States (TSUS)), to certain parts or components packaged in Mexico with assembled electric garage door openers. The initial request dated March 23, 1987, was submitted on behalf of the importer by the firm of Baker & McKenzie. Subsequent submissions dated March 13, and December 19, 1989, were prepared by the firm of Pillsbury, Madison & Sutro. No samples of the subject merchandise were submitted for examination.

Facts:

Certain U.S.-made and foreign parts are packaged in Mexico with foreign assembled garage door openers. The U.S. items include a clip and brackets, which are packed loose in the box containing the opener, and various hardware items—nuts, bolts, screws, a cotton pin, a small tube of grease, a length of nylon rope and a plastic handle of identifiable U.S. and non-U.S. origin—which are packaged in a plastic bag. (These parts are used by the ultimate purchaser in the U.S. to complete and install the garage door opener.) The plastic bag is heat-sealed and either taped or stapled to a portion of the garage door opener. These loose-packed parts and the parts packaged in the plastic bag are then imported with the foreign assembled garage door openers into the U.S.

Counsel states that allowances in duty have been granted for a substantial portion of the value of the entries of the electric garage door openers under HTSUS subheading 9802.00.80. However, your office declined to grant an exemption from duty under HTSUS subheading 9801.00.10 for those U.S. parts which were merely packaged abroad with the garage door openers and returned. In counsel's opinion, these U.S.-origin parts are entitled to such treatment, and in support of his contention, references numerous Customs ruling letters—731806 (November 18, 1988), 071705 (February 21, 1984), and 058632 (November 14, 1978)—and the recent decision in *Superscope, Inc.* v. *United States*, Slip Op. 89-167, Court No. 85-03-00328 (1989).

In the event we deny the claim to duty-free treatment under HTSUS subheading 9801.00.10, counsel alternatively requests that we consider whether the parts packaged in the plastic bag are eligible for the partial duty exemption under HTSUS subheading 9802.00.80.

Issue:

Whether the described U.S. items, which are merely packaged abroad with other parts of foreign origin and with foreign assembled garage door openers, are eligible for duty-free treatment under HTSUS subheading 9801.00.10 when returned to the U.S.

Law and Analysis:

The imported articles affected by this internal advice request were entered both before and after the effective date of the HTSUS (January 1, 1989).

HTSUS subheading 9801.00.10 provides for the duty-free entry of products of the U.S. that are returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means while abroad, provided there has been compliance with the documentary requirements of section 10.1, Customs Regulations (19 CFR 10.1).

In the recent decision of *Superscope, Inc.* v. *United States,* Slip Op. 89-167 (CIT 1989), the court held that certain glass panels of U.S. origin that were exported, repacked abroad with certain foreign components, and returned to the U.S. as part of unassembled audio cabinets, were entitled to duty-free entry under TSUS item 800.00, since the U.S. panel portion of the imported article was "not 'advanced in value or improved in condition * * * while abroad,' but [was] merely repacked." Although the *Superscope* case concerned the TSUS, not the HTSUS, the decision is believed to be equally applicable to similar situations arising under the HTSUS, since TSUS item 800.00 and relevant Schedule 8, TSUS, headnotes were carried over virtually unchanged into the HTSUS.

We believe that the decision in *Superscope* is controlling in regard to the facts of the instant case. Various parts of U.S. origin are exported, merely repackaged with foreign items, and returned to the U.S. as part of electric garage door opener kits. Therefore, since these U.S. parts are not advanced in value or improved in condition while abroad, we find that they are entitled to duty-free entry under HTSUS subheading 9801.00.10. This presumes that the documentary requirements of 19 CFR 10.1 are met, and that your office is satisfied that those specific parts claimed to be American goods returned are, in fact, U.S. products.

In view of the foregoing, there is no need to consider counsel's alternative argument regarding the applicability of HTSUS subheading 9802.00.80 to the U.S. parts packaged in the plastic bag.

Holding:

The specified U.S.-made parts that are merely repackaged abroad are entitled to duty-free treatment under HTSUS subheading 9801.00.10 (and TSUS item 800.00) when returned to the U.S., provided the documentary requirements of 19 CFR 10.1 are satisfied.

(C.S.D. 90-67)

Copyright: Copyright infringement of "Rock'n Flowers".

Date: March 21, 1990
File: HQ 733025
CPR-3 CO:R:C:V 733025 SFW
Category: Copyright

R. Personett
Inspector, Chicago MET Team
U.S. Customs Service
1050 East Irving Park Road
Bensenville, Illinois 60106

Re: Copyright Infringement—"Rock'n Flowers"—Copyright Reg. No. VA 328-878 and Copyright Reg. No. VA 329-261, HQ Issuance 89-029, effective March 20, 1989.

Dear Inspector Personett:

Your memorandum of January 5, 1990, forwarded the file on Entry No. W24-0002907-0 and Entry No. 336-0167157-2 and requested a Headquarters decision pursuant to section 133.43(c)(1), Customs Regulations (19 CFR 133.43(c)(1)), concerning the allegedly infringing importation of "dancing flowers" in violation of the above-referenced copyrights owned by Takara Co., Ltd.

Facts:

This case involves the seizure of two shipments of "dancing flowers" sculptural toys. On September 15, 1989, Marshall Field & Company ("Marshall") filed Customs Entry No. 336-0167157-2 for the importation of a shipment of "dancing flowers," made in Taiwan and valued at \$106,512.00 (Seizure #1). On November 8, 1989, Joe Farah Sales, Inc. ("Farah") filed Customs Entry No. W24-0002907-0 also for the importation of "dancing flowers," also made in Taiwan, valued at \$6,804.00 (Seizure #2). Both shipments were routinely checked for possible infringement of copyrighted "dancing flowers" recorded with Customs. The Marshall shipment contained merchandise similar to the Takara Co., Ltd. ("Takara") "Garbera" dancing flower, Copyright Reg. No. VA 329-261, HQ Issuance 89-029, effective March 20, 1989. The Farah shipment contained articles similar to the Takara "Sunflower" dancing flower, Copyright Reg. No. VA 328-878, HQ Issuance 89-029, effective March 20, 1989.

Pursuant to section 133.43, Customs Regulations (19 CFR 133.43), each shipment was detained on suspicion of copyright infringement. Both importers denied that the flowers are piratical copies. Takara posted the required surety bonds in the amount of \$106,512.00 for Seizure #1 and \$6,804.00 for Seizure #2 and filed a written demand for exclusion of the suspect articles in each case. Both importers subsequently submitted written materials in support of their po-

sition, both pointing out that the allegedly infringing items were also copyrighted. The copyright owner submitted documents supporting its position. The file was forwarded to Headquarters for a decision on the infringement issue.

Issue:

Whether the dancing flowers imported by Marshall Field & Company and by Joe Farah Sales, Inc. are copyright infringements of the Takara Co., Ltd. "Rock'n Flower?"

Law and Analysis:

Section 602(b) of the 1976 Copyright Act prohibits the importation of articles that infringe a copyright. 17 U.S.C. 602(b). Section 603(c) of the Copyright Act provides that articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture. However, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury (Customs) that the importer had no reasonable grounds for believing that his or her acts constitute a violation of law. 17 U.S.C. 603(c); *See* also section 133.47, Customs Regulations (19 CFR 133.47).

Section 603(b)(2) of the Copyright Act requires "that the person seeking exclusion furnish proof, of a specified nature and in accordance with prescribed procedures, that the copyright in which such person claims an interest is valid and that the importation would violate the prohibition in section 602. It is the responsibility of the copyright owner to persuade Customs that the items in question are infringing and should not be granted entry into the U.S. 19 CFR 133.43(c)(1).

To prove copyright infringement, the complaining copyright owner must establish three things: 1) the existence and ownership of a valid copyright in the item allegedly infringed; 2) unauthorized copying of the copyrighted work by the defendant; and 3) that the defendant's copying amounts to an unlawful appropriation. *Arnstein* v. *Porter,* 154 F.2d 464 (2d Cir. 1946); Nimmer, *Nimmer on Copyright,* sections 13.02–13.03 (1989) ("Nimmer"); 6 Patry, *Latman's The Copyright Law,* 189–255 (1986).

A certificate of registration issued by the U.S. Copyright Office "constitute[s] prima facie evidence of the validity of the copyright and of the facts stated in the registration certificate." 17 U.S.C. 410(c). Takara possesses valid copyright registration certificates for the dancing flowers allegedly infringed in this case.

The copyright owner, Takara, also must prove that the defendant copied the Rock'n Flowers. If the defendant did not produce the articles but is merely selling them, the test asks whether the manufacturer had access to the original, copied it, and thereby committed an unlawful appropriation. If those requirements are satisfied, the product is an infringing article. Its status as an infringing article does not evaporate merely because the item passes from the hands

of the manufacturer to the hands of a distributor. The seller's knowledge concerning the origin of the goods is also irrelevant to the infringement analysis.

Copying may be established through either direct or indirect evidence. Direct evidence of copying can consist of an admission by the defendant or of testimony by witnesses to the copying. Since both Marshall and Farah deny copying and there are no witnesses, indirect evidence may be used to establish copying. Copying will be inferred if 1) the defendant had access to the copyrighted work and 2) the similarities, between the original and the allegedly infringing item, are so numerous and significant that independent creation is highly unlikely. *Arnstein,* 154 F.2d at 468.

Access can be established if the defendant had "a reasonable opportunity to copy plaintiff's work." *Arc* v. *S.S. Sarna, Inc.,* 621 F. Supp. 916, 921 (E.D.N.Y. 1985). Reasonable opportunity exists if the plaintiff's works were widely disseminated and readily available in the market. *Id.*

The Takara Rock'n Flowers are readily available in the marketplace of not only the U.S. but several foreign countries as well. Most significantly, the Rock'n Flowers are manufactured in Japan and in Hong Kong and distributed in those two countries and in Taiwan. Both the Marshall and the Farah flowers were manufactured in and shipped to the U.S. from Taiwan. In addition, both of Takara's flowers were copyrighted on October 26, 1988, registered with Customs on March 20, 1989, and were available in the U.S. market for many months before either of the two seized shipments arrived in the U.S. Access is reasonably inferred in both situations.

The second stage of the "copying" analysis generally consists of an element-by-element comparison of the competing products. If the similarities between the articles are numerous and significant, those similarities, together with proof of access, will satisfy the copying portion of the infringement test.

The similarities between the imported flowers and the Takara flowers are numerous and significant. The following elements are present in each:

1. The subject is a fanciful flower with human characteristics which moves in response to sound. It is not the actual pattern of motion that is important, just the fact of movement.
2. The motor housing is concealed in a cylindrical flower pot approximately 3.5 inches in height.
3. The motor housing is covered by a round, plastic pad.
4. There are four spade-shaped, green, velvet-like leaves with jagged edges positioned on the stem two-by-two, with two inches of stem between each set of leaves. Also, the leaves face the observer rather than upward, toward a source of light, as do leaves on natural flowers.
5. There is a musical instrument attached to the left upper leaf.

6. There is a polka-dotted ribbon, with uneven edges, tied into a bow around the stem just below the flower head.

7. Seizure #1, like Takara's "Garbera" flower, has petals extending outward from a small round face. Seizure #2 resembles Takara's dancing sunflower. It has a round face surrounded by overlapping petals of a thin spade-like design. The heads on all are positioned at a ninety-degree angle to the stem, facing the observer rather than upward, as in most natural flowers.

8. There are two eyes and a smile imprinted in black ink on the Takara sunflower and Seizure #2 faces. The eyes are oval and the pupils, rest in the bottom half. Although the Seizure #1 face does not bear a smile, this is not significant since on both the Garbera and Seizure #1 flowers the face is so small it is obscured from view by the sunglasses. On all flowers, the sunglasses are larger than the face, are attached to the flower by a thread-covered elastic band, and are removable.

Where the complaining copyright owner establishes access and similarity, the defendant bears a significant burden of proof with respect to a defense of independent creation. The parties in this case, like many copyright defendants, attempts to focus our attention on trivial differences between the products. The differences are apparent only in a side-by-side comparison of the Takara and the seized flowers. It is doubtful that these items will be displayed side-by-side to the consumer. Additionally, the test for infringement focuses on the similarities between the competing products, not on their differences. *Atari, Inc.* v. *North American Philips Consumer Corp.*, 672 F.2d 607, 618 (7th Cir.), *cert. denied*, 459 US 880 (1982) (reversing the district court's decision which focused on dissimilarities). One of the reasons for this rule is to prevent the common practice of "deliberate non-copying," wherein a manufacturer will intentionally make insignificant changes in the product in order to simulate the copyrighted work without infringing. Although significant differences could be persuasive as a defense to copying, those of the flowers at issue here are not. *See* Nimmer at section 13.03[B][1][b].

The numerous and significant similarities between the Takara Rock'n Flowers and the Marshall Field and Joe Farah dancing flowers, together with the availability of the Takara flowers in the marketplace, lead us to conclude that the producers of the seized flowers developed their design by copying the Takara product, and not through a process of independent creation.

Copying, in and of itself, does not constitute infringement. In order to be guilty of infringement, the offending party must copy enough of the original to constitute an unlawful appropriation. Unlawful appropriation occurs when the defendant takes "from the plaintiff's works so much of what is pleasing to [the consuming public] * * * that the defendant wrongfully appropriated something which belongs to the plaintiff." *Arnstein* v. *Porter*, 154 F.2d 464, 473

(2d Cir. 1946). The term "substantial similarity" is often used to describe the level of overall similarity necessary for infringement.

The standard which courts apply to determine whether copying constitutes an unlawful appropriation is that of the ordinary, lay observer. Some courts incorporate this standard into what they call the "total concept and feel" test. *E.g., Roth Greeting Cards* v. *United Card Co.,* 429 F.2d 1106 (9th Cir. 1970). If an ordinary observer would be disposed to overlook the minor differences in the products and regard their aesthetic appeal as the same, then the product is said to be substantially similar and unlawful appropriation has occurred. *United Merchants & Mfrs.* v. *Sutton,* 282 F. Sup. 588 (S.D.N.Y. 1967). Element-by-element dissection of the similarities between the two products is inappropriate at this stage of the infringement analysis. The overall appearance of the product and the impression it makes on the ordinary consumer determines its nature as a copyright infringement.

The seized articles in this case are so similar to Takara's flowers that an ordinary consumer, seeing the seized flowers standing alone or even in close proximity to the Takara flowers, when a comparison could occur, would overlook the minor differences and regard their aesthetic appeal as the same. Our analysis leads us to conclude that the Marshall and Farah dancing flowers copy the "Rock'n Flower" design to such a significant degree that they infringe Takara's copyright.

Both defendants point out that their dancing flowers are also copyrighted. Interestingly, both rely upon Copyright Reg. No. VA 343–015, effective March 7, 1989. A certificate of registration creates only a rebuttable presumption of copyright validity. If evidence is introduced to show that the item in fact infringes another copyrighted item, the certificate will not shield its owner from liability. *Durham Industries, Inc.* v. *Tomy Corp.,* 630 F.2d 905 (2d Cir. 1980). Likewise, the fact that a product has a copyright registration of its own has no bearing upon whether or not it is an infringing importation. When evidence clearly indicates piratical copying, or reason to suspect piratical copying, of a copyright recorded with Customs, even though the imported article itself is the subject of a copyright registration, Customs officers shall detain the merchandise and proceed under 19 CFR 133.43. *See* C.S.D. 86–23; C.S.D. 89–90. The evidence shows that the Marshall Field and the Joe Farah flowers are copyright-infringing articles. Therefore, the copyright registration certificate upon which they rely is immaterial to Customs decision.

Furthermore, it has come to our attention that the certificate that allegedly protects the flowers in this case, Copyright Reg. No. VA 343–015, has been presented by defendants in several other dancing flower infringement cases. In each of those cases, the flower allegedly protected by the certificate is slightly different. We suggest that the fraudulent nature of the certificate be taken into consideration when determining whether to allow the importer to re-

export his products, especially if the importer's claim that it had no reason to know of the illegality of its acts is supported solely by the existence of the certificate.

Holding:

It is our opinion that the Marshall Field & Company and the Joe Farah Sales, Inc. "dancing flowers" should be denied entry into the U.S. because they infringe the rights of the copyright owner, Takara Co., Ltd. The infringing articles are subject to seizure and forfeiture. However, the district director may allow the return of the imported articles to the country of export, if he is satisfied that the importer had no reasonable grounds for believing that importing the goods constituted a violation of law. The bond of the copyright owner shall be returned. Copies of this decision may be furnished to all interested parties.

(C.S.D. 90-68)

Marking: The country of origin marking of shipping labels attached to shipping cartons containing imported goods.

Date: March 15, 1990
File: HQ 733018
MAR-2-05 CO:R:C:V 733018 KG
Category: Marking

RICHARD G. SELEY
RUDOLPH MILES & SONS, INC.
4950 Gateway East
P.O. Box 144
El Paso, Texas 79942

Re: Country of origin marking of shipping labels attached to shipping cartons containing imported goods.

DEAR MR. SELEY:

This is in response to your letter of January 2, 1990, requesting a country of origin ruling regarding shipping labels attached to shipping cartons containing imported goods.

Facts:

You have clients who put shipping labels on their shipping cartons containing imported goods. The shipping labels direct where the shipping carton should be delivered and indicate where the shipping carton is coming from. You submitted three samples of types of shipping labels used by your clients.

The first sample is about 5 inches by 4 inches. The top of the label says "TO CALHOUN" in letters about ½ inch in height. Below that, the label identifies the part number, quantity, manifest and

lot. Below this information, is the phrase "Shipped by" and a list of 19 localities. This label is attached to each pallet load of shipping cartons. You also submitted a photograph of a shipping carton which has the shipping label attached to it and a bold prominent country of origin marking identifying Mexico as the country of origin.

The second sample is a shipping label about 4 inches by 9 inches. The label says "SHIP TO: WHITE RODGERS DIV., EMERSON ELECTRIC CO, 9797 REAVIS ROAD, ST. LOUIS MO 63123."

The third sample is a shipping label about 3 inches by 5 inches. The top of the label contains the phrase "SHIP TO—SAGINAW STEERING GEAR GMC," the word "SAGINAW" in lettering ¾ inches in height, and below that, in smaller lettering "3900 E. Holland Rd., Saginaw, MI 48602." In the lower left-hand corner the phrase "Plant No. 6" is printed.

Issue:

Whether addresses on shipping labels attached to shipping cartons containing imported goods trigger the requirements of 19 CFR 134.46.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. The Court of International Trade stated in *Koru North America* v. *United States,* 701 F. Supp. 229, 12 CIT —— (CIT 1988), that: "In ascertaining what constitutes the country of origin under the marking statute, a court must look at the sense in which the term is used in the statute, giving reference to the purpose of the particular legislation involved. The purpose of the marking statute is outlined in *United States* v. *Friedlaender & Co.,* 27 CCPA 297 at 302, C.A.D. 104 (1940), where the court stated that: "Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.46, Customs Regulations (19 CFR 134.46), requires that when the name of any city or locality in the U.S., other than the name of the country or locality in which the article was manufactured or produced, appears on an imported article or its container, there shall appear, legibly and permanently, in close proximity

to such words, letters, or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning. The purpose of this section is to prevent the possibility of misleading or deceiving the ultimate purchaser as to the actual origin of the article.

In HQ 732329 (July 12, 1989), Customs held that an address on a warranty tag directing the post office where to deliver the warranty tag did not trigger the requirements of 19 CFR 134.46. In this case, all three samples submitted are shipping labels which merely identify the destination and shipping origination of the shipping carton and do not and are not intended to indicate the country of origin of the contents of the carton. The shipping labels described above are similar to the address on the warranty tag; both addresses are intended to identify the address that the mail or container is being sent to and do not connote the origin of the contents of the package. A reasonable ultimate purchaser would not be confused or mislead by such an address and Customs has no intent to interfere with the delivery of mail or packages.

T.D. 86-129, published in the Federal Register on July 9, 1986 (51 FR 24814), which you mentioned in your letter, set forth the policy of Customs relating to country of origin marking requirements for imported footwear. It refers only to shoe boxes containing imported footwear where the name of a country or locality other than the country of origin appears on the imported footwear or shoe box in the context of size references and patent notices. This Treasury Decision has no application to shipping labels placed on shipping containers for the purpose of directing delivery of the shipping container.

Holding:

Shipping labels placed on shipping cartons containing imported goods for the purpose of directing delivery of the shipping cartons to the designated location do not trigger the requirements of 19 CFR 134.46.

(C.S.D. 90-69)

Marking: The country of origin marking requirements of sweaters which are knit in China and assembled in Hong Kong.

Date: May 2, 1990
File: HQ 733323
MAR 2-05 CO:R:C:V 733323 LR
Category: Marking

Ronald W. Gerdes, Esq.
Sandler, Travis & Rosenberg, P.A.
1120 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Gerdes:

This is in response to your letter dated April 24, 1990, submitted on behalf of a number of your clients including The Gap and Salant Corporation, concerning the country of origin marking requirements of sweaters which are knit in China and assembled in Hong Kong.

Facts:

Treasury Decision 90–17, published in the Federal Register on March 1, 1990 (55 F.R. 7303), announced a change of practice to conform the rules of origin for textile products for all purposes to the rules set forth in section 12.130, Customs Regulations (19 CFR 12.130), which on their face apply only to quota determinations. The change will be effective as to merchandise entered, or withdrawn from warehouse for consumption on or after June 29, 1990. The change of practice affects the country of origin marking requirements of sweaters which are knit in one country and assembled in another. Pursuant to 19 CFR 12.130, the country of origin of the sweater is the country where the panels are knit. Therefore, in accordance with T.D. 90–17, effective June 29, 1990, sweaters which are assembled in Hong Kong from panels knit in China are for all purposes, including country of origin marking, products of China.

You note that since neither the Federal Register notice nor any other rulings or directives of which you are aware provide any guidelines as to what specific language will or will not be acceptable for indicating the appropriate country of origin as determined by the new rule, you request a delay in the implementation of the final rule. You also indicate that there has been some disagreement concerning what is considered acceptable language under the new rules and your clients have been unable to begin taking the necessary steps to comply with the new requirement.

Issues:

(1) How should sweaters which are knit in China and assembled in Hong Kong be marked to indicate the country of origin after the change of practice announced in T.D. 90-17 goes into effect?

(2) Will the June 29, 1990 implementation date of T.D. 90–17 be delayed?

Law and Analysis:

Acceptable Marking

Section 304 of the Tariff Act of 1930, as amended, (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous

place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. The term "country of origin" is defined in section 134.1(b)), Customs Regulations (19 CFR 134.1(b)) as the country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part.

In accordance with the above provisions an imported article generally has only one country of origin (*i.e.,* the country where the last substantial transformation occurred). The name of this country must be clearly indicated on the imported article. Reference may be made to a second country so long as the country of origin is clearly stated and the requirements of section 134.46, Customs Regulations (19 CFR 134.46), are satisfied. This regulation requires that in any case in which the name of any country other than the country in which the article was manufactured or produced appears on an imported article or its container, there shall appear, legibly and permanently, in close proximity to such name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning.

As indicated above, pursuant to T.D. 90–17 and 19 CFR 12.130 the country of origin of a sweater which is knit in China and assembled in Hong Kong is China. Applying the general country of origin marking requirements, any acceptable marking on the finished sweaters must clearly indicate that China is the country of origin. Customs would accept the word "China" standing alone or any of the following markings: "Made in China", "Product of China" and "Knit in China".

If, however, any reference is made to the processing performed in Hong Kong, the requirements of 19 CFR 134.46 must be satisfied and the country of origin must be preceded by "Made in", "Product of," or other words of similar meaning. For purposes of this provision, we consider "Knit in" words of similar meaning to "Made in" or "Product of". Thus, the words "assembled in Hong Kong" or "assembled and finished in Hong Kong" may precede or follow "Made in China", "Product of China", or "Knit in China". For example, "Knit in China. Assembled in Hong Kong" would be acceptable country of origin marking.

It should also be noted that any marking which refers only to the country of origin of the sweater parts, rather than the sweater, does not satisfy the requirements of 19 U.S.C. 1304 and 19 CFR Part 134. For example, the marking "Assembled in Hong Kong from parts knit in China" is not acceptable marking. Such language does not

satisfy the requirements of 19 U.S.C. 1304 and 19 CFR Part 134 because it does not clearly indicate the country of origin of the imported sweater.

EFFECTIVE DATE

As indicated above, the change announced in T.D. 90–17 is effective as to merchandise entered, or withdrawn from warehouse for consumption, on or after June 29, 1990, 120 days after the date of publication. However, because neither the Federal Register Notice nor other rulings or directives provides any guidelines as to what specific language will or will not be acceptable to indicate the appropriate country of origin as determined by the new rule, you request a delay in the implementation of the final rule.

We are of the opinion that the original implementation period provided sufficient time to comply with the new marking rules. The fact that Customs has not previously ruled on the specific language that will be acceptable for indicating the appropriate country of origin of articles which are affected by T.D. 90–17 is insufficient reason to delay the effective date. The general rules for marking set forth in the statute and the regulations are applicable to the sweaters and all other articles which are affected by the change of practice. The requirements of 19 CFR 134.46 as interpreted by Customs in numerous rulings are clear. The fact that there has been some reluctance to mark the sweaters in accordance with the general marking requirements is insufficient reason to extend the implementation date. The request for a delay is denied.

Holding:

A sweater assembled in Hong Kong from panels knit in China and entered or withdrawn from warehouse for consumption on or after June 29, 1990, must be marked to clearly indicate that it is a product of China. In accordance with 19 U.S.C. 1304 and 19 CFR Part 134, these sweaters may be marked "China", "Made in China", "Product of China" or "Knit in China".

If any reference is made to the processing performed in Hong Kong, the requirements of 19 CFR 134.46 must be satisfied. The country of origin must be preceded by the words "Made in", "Product of" or words of similar meaning and appear in close proximity to and in comparable size letters as the Hong Kong reference. For purposes of this provision, we consider "Knit in" words of similar meaning to "Made in" or "Product of". Thus, the words "assembled in Hong Kong" or "assembled and finished in Hong Kong" may precede or follow "Made in China", "Product of China", or "Knit in China".

Any marking which does not clearly indicate that the country or origin of the sweater is China and refers only to the country of origin of the sweater parts or panels is not acceptable.

U.S. Customs Service

General Notice

19 CFR Part 4

SIXTH PROVISO TO 46 U.S.C. APP. 883—STEVEDORING EQUIPMENT; TRANSPORTATION IN VESSEL WHICH DOES NOT USE THE EQUIPMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed change of position; solicitation of comments.

SUMMARY: The U.S. Customs Service is reviewing its current interpretation of the sixth proviso to the coastwise merchandise statute (46 U.S.C. App. 883) relating to the transportation of stevedoring equipment and material. The current position of Customs is that stevedoring equipment and material may be transported between coastwise points in a non-coastwise-qualified vessel if the requirements of the sixth proviso are met, even if the stevedoring equipment is not used exclusively for loading and unloading the transporting vessel. This interpretation, however, may not be consistent with the intent of the stevedoring equipment and material provision of the sixth proviso. Customs is considering revoking its current interpretation, resulting in the issuance of new rulings holding that stevedoring equipment and material transported under the sixth proviso must be used exclusively for loading and unloading the transporting vessel. Because this possible change of position could have an impact on certain members of the public, Customs is inviting public comments on the subject.

DATE: Comments must be received on or before July 23, 1990.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: B. James Fritz, Carrier Rulings Branch, 202-566-5706.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs is reviewing its current position that stevedoring equipment and material may be transported in certain non-coastwise-qualified vessels where the requirements of the sixth proviso to the coastwise merchandise law (46 U.S.C. App. 883) are met, even if the stevedoring equipment and material is not exclusively used for loading and unloading the transporting vessel.

Section 27, of the Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), the Jones Act, provides in part that no merchandise shall be transported between points in the U.S. embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the U.S. and owned by citizens of the U.S. The Act of September 21, 1965 (Pub. L. 89–194, 79 Stat. 823), added the sixth proviso to section 883, and the Act of August 11, 1968 (Pub. L. 90–474, 82 Stat. 700), amended the originally enacted sixth proviso.

The 1965 Act exempted from the provisions of section 883 the coastwise transportation of empty cargo vans, empty lift vans, and empty shipping tanks in non-coastwise-qualified U.S.-flag vessels or foreign flag vessels on a reciprocal basis where the vans and tanks are owned or leased by the owner or operator of the transporting vessels and are being transported for use in the carriage of cargo in foreign trade. The 1968 Act added equipment for use with cargo vans, lift vans, empty shipping tanks, empty barges specifically designed for carriage aboard a vessel and certain equipment for use with such barges, and certain empty instruments of international traffic to the articles included in the sixth proviso. These articles and the articles covered by the 1965 Act were required by the 1968 Act to be owned or leased by the owner or operator of the transporting vessel and to be transported for his use in handling his cargo in foreign trade.

The 1968 Act also added stevedoring equipment and material to the articles included in the sixth proviso. To qualify for exemption from section 883 under the sixth proviso, the stevedoring equipment and material must be "owned or leased by the owner or operator of the transporting vessel, or * * * by the stevedoring company contracting for the lading or unlading of that vessel", and the stevedoring equipment and material must be transported without charge for use in the handling of cargo in foreign trade.

Customs position on the interpretation of the sixth proviso relating to stevedoring equipment and material has been that stevedoring equipment and material transported under the proviso by the owner of the vessel is not required to be used exclusively for loading or unloading the transporting vessel. In its most recent ruling on this subject, Customs held that a vessel of a foreign country that

provides reciprocal treatment to U.S. vessels, which was bareboat chartered by the owner of certain cranes, could be used to transport the cranes between U.S. points where the cranes were to be used to load and unload cargo of the owner of the cranes into or from vessels other than the vessel which transported the cranes. (109629/109464, July 21, 1988).

Customs has received a request on behalf of an owner and operator of U.S.-flag coastwise-qualified vessels to reverse this position and to issue a new interpretation of the sixth proviso. Pursuant to this interpretation, stevedoring equipment and material transported under the sixth proviso would be required to be employed exclusively for the purpose of loading and unloading the transporting vessel. The party requesting this action contends that the current position of Customs is inconsistent with the congressional intent of the 1968 Act which added stevedoring equipment and material to the sixth proviso.

Customs has been guided by the general rule of law that a proviso which carves out a special class of cases from the purview of a general or comprehensive statute "is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose." *United States* v. *McElvain,* 272 U.S. 633, 639 (1926). The purpose of the coastwise laws, and particularly of 46 U.S.C. App. 883, is to promote development of the U.S. merchant marine. *American Maritime Association* v. *Blumenthal,* 590 F.2d 1156, 1158–59 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 943 (1979). Pursuant to the coastwise laws, "all vessels engaged in the coastwise or other domestic trade have been required to be American-built and American-owned." *Id.* at 1159. Customs is required to strictly construe the sixth proviso when it permits merchandise to be transported between coastwise points in non-coastwise-qualified vessels.

Customs now believes the weight of authority indicates that the stevedoring equipment and material provision added to the sixth proviso by the 1968 Act was intended to apply only to stevedoring equipment and material used to load and unload the vessel transporting the stevedoring equipment and material. See 114 Cong. Rec. 21480, 21481 (1968) (remarks of Representatives Mailliard, Green, and Dellenback); H. Rep. No. 1712, 90th Cong., 2nd Sess. (1968) (page 2, quoting the comments of the Department of Commerce); and Sen. Rep. No. 1485, 90th Cong., 2nd Sess. (1968) (reprinted at 1968 U.S.C.C.A.N. 3185) (July 19, 1968, letter from General Counsel of the Department of Commerce).

Customs is suspending the issuance of rulings on this issue during the pendency of Federal Register notice and comment procedures. Customs is considering the revocation of its July 21, 1988, ruling and similar rulings (106595, February 22, 1984; 103747, December 8, 1978; 102881/102585, June 16, 1977; 102055, March 26, 1976). Customs proposes the issuance of a new ruling which would hold that stevedoring equipment and material transported under the

sixth proviso must be used exclusively for loading and unloading the transporting vessel.

AUTHORITY

Because this change of position, if implemented, will result in some operational changes in affected business entities, Customs is providing interested parties notice and an opportunity to comment in accordance with section 177.10(c)(2), Customs Regulations (19 CFR 177.10(c)(2)).

REQUEST FOR COMMENTS

Prior to final determination, consideration will be given to any written comments timely submitted to Customs. Submitted comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.6, Treasury Department Regulations (31 CFR 1.6), and section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, U.S. Customs Service.

DRAFTING INFORMATION

The principal author of this document was Michael Smith, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ELIZABETH B. ANDERSON,
Acting Commissioner of Customs.

Approved: May 15, 1990.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 23, 1990 (55 FR 21204)]

U.S. Court of Appeals for the Federal Circuit

ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, PLAINTIFFS-APPELLANTS, ASSOCIATION OF FLORAL IMPORTERS OF FLORIDA; RIVERDALE FARMS, INC.; GRUPO ANDES; AND FLORES FUNCA, PLAINTIFFS *v.* UNITED STATES, AND FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, DEFENDANTS-APPELLEES

Appeal No. 89-1748

(Decided May 16, 1990)

Patrick F.J. Macrory, Arnold & Porter, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *Spencer S. Griffith* and *Gwyn F. Murray.*

Jeanne E. Davidson, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendants-appellees, The United States. With her on the brief were *Stuart M. Gerson,* Assistant Attorney General and *David M. Cohen,* Director. Also on the brief were *Wendell L. Willkie, II,* General Counsel, *Stephen J. Powell,* Chief Counsel for Import Administration and *Anne White,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel. *James R. Cannon, Jr.,* Stewart & Stewart, of Washington, D.C., argued for defendants-appellees, Floral Trade Council of Davis, California. With him on the brief were *Eugene L. Stewart, Terence P. Stewart* and *Jimmie V. Reyna.*

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before MAYER, *Circuit Judge,* BALDWIN and FRIEDMAN, *Senior Circuit Judges.*

FRIEDMAN, *Senior Circuit Judge.*

This is an appeal from (1) a decision of the Court of International Trade refusing to enjoin the International Trade Administration of the Department of Commerce (Administration) from conducting an annual administrative review in a dumping case, and (2) the judgment of that court dismissing the action that challenged the Administration's institution of that review. We affirm.

I

A. In March 1987, in response to a petition filed by the appellee Floral Trade Council of Davis, California (Council), an association of United States flower growers, the Administration held that sales of certain imported flowers from Colombia were being made at less than fair value and imposed antidumping duties. *Certain Fresh Cut Flowers from Colombia,* 52 Fed. Reg. 6842 (Dep't Comm. 1987). The

Administration found that the dumping margins ranged from .057 percent to 83.14 percent.

The statute provides that, at least once during each 12-month period following the publication of an antidumping order, the Administration shall "review, and determine * * * the amount of any antidumping duty" "if a request for such a review has been received," 19 U.S.C. § 1675(a)(1)(B) (1988). By regulation, the Administration has stated that "an interested person"

> may request in writing that the Secretary conduct an administrative review of specified individual manufacturers, producers, or exporters ("producers or exporters") covered by the order or finding, if the requesting person states why the person desires the Secretary to review those particular producers or exporters * * *.

19 C.F.R. § 353.53a(a)(1) (1987) (recodified at 19 C.F.R. § 353.22(a)(1) (1989) with minor changes).

B. In March 1988, the Council requested an administrative review of sales during the preceding 12 months by six named Colombian exporters and of sales to 24 designated importers and brokers of Colombian flowers. The Administration instituted a review of the sales by the six exporters. It declined to investigate the 24 importers and brokers, however, on the ground that the regulation covered only "manufacturers, producers, or exporters" and not importers or brokers. The Administration subsequently rejected as untimely a request by the Council for an alternative investigation of "all Colombian growers."

The Court of International Trade upheld the Administration's refusal to investigate either the importers and brokers or "all Colombian growers." *Floral Trade Council* v. *United States,* 692 F. Supp. 1387 (Ct. Int'l Tr.), *after remand,* 707 F. Supp. 1343 (Ct. Int'l Tr. 1989). This court affirmed the Court of International Trade, upholding the Administration's rulings that (1) the regulations do not provide for investigation of importers and purchasers and (2) the request to investigate "all Colombian growers" was untimely. *Floral Trade Council of Davis, Cal.* v. *United States,* 888 F.2d 1366, 1370 (Fed. Cir. 1989).

C. In March 1989, the Council requested the Administration to conduct another administrative review for the 12 preceding months. Letter of Eugene L. Stewart, Stewart & Stewart, for Council, to Robert Mosbacher, Sec'y, U.S. Dep't of Commerce, dated Mar. 29, 1989 (Request for § 751 Administrative Review) [hereinafter Council Letter]. It stated that "[d]espite the presence of the dumping order, widespread dumping of fresh cut flowers imports has continued in the U.S. market." It attached as a confidential exhibit "[e]vidence of sales of standard carnations and pompon chrysanthemums at severely discounted prices made during the period of this requested review * * *." *Id.* at 1.

The Council requested the Administration to review seven named "Colombian companies" that "were respondents in the original antidumping duty investigation and were determined to have been dumping on the U.S. market." *Id.* at 2. The Council also named 10 importers and 21 brokers who "are placing on the U.S. market low priced products." *Id.* It stated that the "suppliers of these importers, therefore, are among the Colombian producers most likely to be dumping" but that the Council "cannot identify the suppliers of these importers." *Id.*

The Council requested that the Administration review 170 named "Colombian growers." The Council stated that it believed that "some or all" of those growers "are suppliers of the specific importers known to be selling imported fresh-cut flowers." *Id.* at 4. The Council also listed 34 additional "Colombian exporters" to be investigated, who had "been identified, but not verified, as exporters (1) that did not export flowers subject to the investigation, or (2) that were listed as exporters of the subject flowers, but for whom no export statistics are available. Exports of the flowers subject to investigation may have occurred subsequent to the original investigation and during the period of this review." *Id.* at 4–5.

The appellant Asociacion Colombiana de Exportadores de Flores (Asociacion), an association of Colombian exporters of cut flowers to the United States, and an association of importers of those flowers, urged the Administration to reject the request for administrative review. They argued that the Council's request did not comply with the Administration's "regulation governing administrative review" because it "requested a blanket review of *all* Colombian exporters and has failed to provide adequate reasons why all exporters should be reviewed." Letter of Patrick F.J. Macrory, Arnold & Porter, for Asociacion, to Robert A. Mosbacher, Sr., Sec'y, U.S. Dep't of Commerce, dated Apr. 5, 1989, at 2 (emphasis in original).

The Administration rejected the objection and initiated the requested administrative review of 203 of the 204 named Colombian exporters. (One exporter was excluded because, in the original investigation, its dumping margins were *de minimis.*) *Initiation of Antidumping and Countervailing Duty Administrative Review; Notice of Initiation*, 54 Fed. Reg. 18,320 (Dep't Comm. 1989). An internal Administration memorandum to the files explaining the reasons for the investigation stated that the Council "has specified the Colombian growers and exporters which it wants reviewed and has provided reasons which the Department considers adequate * * *."

Asociacion then filed in the Court of International Trade the present action challenging the Administration's initiation of the administrative review. It argued that the Administration had violated its own regulation, and sought a preliminary injunction.

In a detailed opinion, the court first held that it had jurisdiction of the suit under 28 U.S.C. § 1581(i), which gives the court so-called residual jurisdiction. The court rejected the contention of the gov-

ernment and the Council that the only method by which Asociacion could challenge the initiation of the administrative review was as part of judicial review of the final order the Administration would enter at the conclusion of the administrative review. *Asociacion Colombiana de Exportadores de Flores (Asocoflores)* v. *United States*, 717 F. Supp. 847, 849–51 (Ct. Int'l Tr. 1989).

The court then denied a preliminary injunction because Asociacion had failed to show a likelihood of success on the merits. The court held that the Administration "acted reasonably when it determined that sufficient 'reasons' had been stated and decided to go forward with the administrative review on the basis of [the Council's] requests." *Id.* at 853.

In a short opinion on the merits, the court "adopt[ed] the discussion" in its opinion denying a preliminary injunction. *Asociacion Colombiana de Exportadores de Flores (Asocoflores)* v. *United States*, 718 F. Supp. 1547, 1548 (Ct. Int'l Tr. 1989). The court stated that it "remains of the view that the [Administration] did not violate its regulation, 19 C.F.R. § 353.53a(a) (1988), by agreeing to conduct an administrative review of its unfair trade order, with respect to 203 exporters or growers of cut flowers from Colombia." *Id.* at 1548. It ruled that the Administration had "acted reasonably in deciding that a broad review of an industry composed of numerous small exporters is appropriate where the lines to importers whose sales allegedly harm [the Council] are not clear," and that the Council's request for the administrative review "satisfies the letter of the regulation and [the Administration] has not acted unreasonably in deciding in this situation that the spirit of the regulation is met as well." *Id.*

II

The government, but not the Council, argues that the Court of International Trade had no jurisdiction under 28 U.S.C. § 1581(i)(4) over this suit. According to the government, that court "possesses jurisdiction to entertain a challenge to the initiation of an administrative review only *after* Commerce has completed the review and has published the *final* results." (Emphasis in original.)

The government made virtually the same argument in a similar situation in *Sharp Corp.* v. *United States*, 837 F.2d 1058 (Fed. Cir. 1988). There the government appealed from a preliminary injunction of the Court of International Trade barring the Administration from conducting administrative reviews of antidumping orders unless the agency met certain conditions. In discussing the government's contention that the Court of International Trade lacked jurisdiction, we stated:

> The government's argument that the Court of International Trade has no authority to control Commerce's administrative reviews of the antidumping order really is a contention that judicial review of Commerce's interlocutory actions in conducting

> such review is premature, not that the court has no jurisdiction to consider the question. It is an aspect of the exhaustion-of-administrative-remedies doctrine—that judicial review of administrative action is inappropriate unless and until the person seeking to challenge that action has utilized the prescribed administrative procedures for raising the point.

This analysis is equally applicable to the government's jurisdictional argument here.

In *Sharp,* we reversed the preliminary injunction because we concluded that the companies would not suffer irreparable injury by participating in the administrative review. In view of that action, we stated:

> In these circumstances we find it unnecessary to consider the government's contention that any judicial review of the methods Commerce is using to conduct its administrative review must await Commerce's final decision on Sharp's and Toshiba's request that the antidumping order be revoked with respect to them.

Id.

We follow the same course in the present case. Since, for the reasons given in part III, we uphold the Court of International Trade's denial of a preliminary injunction and dismissal of the action, "we find it unnecessary to consider the government's contention that any judicial review of the" Administration's initiation of the administrative review "must await Commerce's final decision" in that administrative review.

III

Asociacion's only contention is that the Administration's initiation of the administrative review violated its regulation 19 C.F.R. § 353.53a(a)(1) (1987). We agree with the Court of International Trade, however, that the Administration's action did not violate the regulation.

As noted, the regulation prescribes two requirements for a request for an annual administrative review: (1) The request must relate to "specified individual manufacturers, producers, or exporters ('producers or exporters')" covered by the antidumping order or finding, and (2) the requester must state "why" it wants the Administration "to review those particular producers or exporters." 19 C.F.R. § 353.53a(a)(1).

The Administration justifiably concluded that the Council's request satisfied both of those requirements.

The request listed by name the 204 Colombian producers the Council asked the Administration to investigate. The request thus "specified" the individual producers or exporters to be investigated. This request stands in sharp contrast to the Council's untimely request in the prior proceeding that the Administration investigate "all Colombian growers" without naming any but six of them.

The request also "state[d] why" the Council sought review of "those particular [named] producers or exporters." The request explained that "widespread dumping of fresh cut flowers imports has continued in the U.S. market" despite the antidumping order, and offered evidence of flower sales "at severely discounted prices made during the period of this requested review * * *." Council Letter, at 1. The Council explained that it could not identify the suppliers of 31 importers and brokers whom it "believed" were selling Colombian flowers at less than fair value, but that it believed that "some or all" of the named Colombian growers it requested to be investigated were "suppliers of the importers and brokers identified" as "placing on the U.S. market low priced products." *Id.* at 2.

Asociacion contends that this explanation of the Council's reasons for requesting investigation of the 204 Colombian exporters was insufficient. According to Asociacion, the Council was required to go further and attempt to determine which of those 204 exporters actually had sold at below fair value.

There is nothing in the regulation that imposes that additional requirement, and we decline to expand the unambiguous language of the regulation to include that condition by implication. The commentary accompanying the final regulation stated that the requirement that the requester state "the reasons why the requester desires review of particular producers or exporters" "is not intended to be a difficult hurdle to overcome." *Antidumping and Countervailing Duties; Administrative Review on Request; Transition Provision; Interim-final and final rule,* 50 Fed. Reg. 32,556, 32,557 (Dep't Comm. 1985). The commentary further stated that "[b]ecause the Department has limited resources, requests and the statements should help the Department focus on the potential respondents which the requester believes to be most important to the requester." *Id.* at 32,557.

The purpose of both requirements in the request is to aid the Administration in the performance of its statutory duty to conduct annual administrative reviews upon request. Although Asociacion contends that the Council's request did not properly satisfy the obligation that the regulation allegedly imposed upon the Council to help the Commission in its work, that determination was for the Administration and not Asociacion to make. The Administration imposed the requirements for its benefit, not for the benefit of the subjects of the requested investigation.

The Administration neither committed legal error nor abused its discretion in concluding that the Council's request "provided reasons which the Department considers adequate."

The Administration's interpretation of its own regulations implementing "the statutes it administers" is entitled to "substantial weight." *Floral Trade Council,* 888 F.2d at 1368. "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. '* * * [T]he adminis-

trative interpretation * * * becomes * * * controlling * * * unless it is plainly erroneous or inconsistent with the regulation.' " *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (quoting *Bowles* v. *Siminole Rock Co.*, 325 U.S. 410, 413–14 (1945)). Here the Administration interpreted the "request" regulation as requiring no more detail than the Council provided. We have no reason to reject the Administration's interpretation and application of its own regulation to the facts of this case.

CONCLUSION

The judgment of the Court of International Trade dismissing this action is

AFFIRMED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90-46)

P.F. PALOS, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-06-00824

MEMORANDUM OPINION AND ORDER

The Customs Service classified certain imported merchandise as "[o]ther footwear," under item 700.60, TSUS. Plaintiff protests this classification and contends that the imported merchandise is properly classifiable as "[o]ther footwear * * *: [h]aving uppers of which over 90 percent of the exterior surface area is rubber or plastics," under item 700.58, TSUS. Plaintiff moves for summary judgment. Defendant opposes the motion and cross-moves for summary judgment.

***Held:* The court concludes that there are no genuine issues of material fact. Since the imported merchandise has been properly classified by Customs as "[o]ther footwear," under item 700.60, TSUS, the action is dismissed.**

[Judgment for defendant; action dismissed.]

(Dated May 10, 1990)

***Grunfeld, Desiderio, Lebowitz & Silverman, (Steven P. Florsheim),* for plaintiff.**

***Stuart M. Gerson,* Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Saul Davis*), and (*Chi S. Choy,* United States Customs Service, Of Counsel), for defendant.**

RE, *Chief Judge:* The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Brazil and described on the customs invoices as "plastic shoe soles."

The imported merchandise entered at the port of San Juan, Puerto Rico, and was classified by the Customs Service as "[o]ther footwear," under item 700.60 of the Tariff Schedules of the United States (TSUS), dutiable at the rate of 20 per centum *ad valorem.* Plaintiff protests this classification and contends that the imported merchandise is properly classified as "[o]ther footwear * * *: [h]aving uppers of which over 90 percent of the exterior surface area is rubber or plastics," under item 700.58, TSUS, dutiable at the rate of 6 per centum *ad valorem.*

The pertinent statutory provisions of the tariff schedules are as follows:

Classified Under:

Schedule 7, Part 1, Subpart A:

Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:

* * * * * * *

Other footwear (except footwear having uppers of which over 50 percent of the exterior surface area is leather):

* * * * * * *

700.60 Other .... 20% *ad val.*

Claimed Under:

Schedule 7, part 1, Subpart A:

Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:

* * * * * * *

Other footwear (except footwear having uppers of which over 50 percent of the exterior surface area is leather):

Having *uppers of which over 90 percent of the exterior surface area is rubber or plastics* (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper):

* * * * * * *

700.58 Other .... 6% *ad val.*
(emphasis added)

The question presented is whether the imported footwear has been properly classified by the Customs Service as "[o]ther footwear," under item 700.60, TSUS, with duty at the rate of 20 per centum *ad valorem,* or whether it contains "uppers of which over 90 percent of the exterior surface area is rubber or plastics," and, hence, is properly classifiable under item 700.58, TSUS, and dutiable at the rate of 6 per centum *ad valorem,* as claimed by plaintiff. In simple terms, the tariff classification of the imported footwear will differ depending upon whether it contains "uppers."

In order to decide the question presented, the court must consider "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 878, *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984). Pursuant to 28 U.S.C. § 2639(a)(1) (1982), the government's classification is presumed to be correct, and the burden of proof is upon the party challenging the classification. *See Jarvis Clark Co.,* 733 F.2d at 876.

Contending that there are no genuine issues of material fact, both parties move for summary judgment pursuant to Rule 56 of the Rules of this court. Based upon the statements of material facts submitted by both parties pursuant to Rule 56(i) of the Rules of this court, the court concludes that there are no genuine issues of material fact.

Upon examining the imported footwear, the pertinent tariff schedules, the relevant case law, lexicographic definitions and the affidavits and motion papers submitted by the parties, it is the holding of the court that the imported footwear has been properly classified by Customs as "[o]ther footwear," under item 700.60, TSUS.

SUMMARY JUDGMENT

On a motion for summary judgment, it is the function of the court to determine whether there are any factual disputes that are material to the resolution of the action. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). It is fundamental that "[t]he court may not resolve or try factual issues on a motion for summary judgment." *Phone-Mate, Inc.* v. *United States*, 12 CIT ——, 690 F. Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989). The court, however, may grant a motion for "summary judgment * * * against a party who fails to present sufficient evidence 'to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Liberty Lobby, Inc.* v. *Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988) (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986)), *cert. denied*, 109 S. Ct. 1118 (1989). In ruling on cross-motions for summary judgment, if no genuine issues of material fact exist, the court must determine whether either party "is entitled to a judgment as a matter of law." USCIT R. 56(d).

BACKGROUND

The imported merchandise consists of a molded piece of semi-rigid clear plastic, in the shape of the sole of a shoe. Two holes are located in the back of the merchandise, and a nib or protrusion of plastic containing a hole, is located in the front. After importation, a lace or thong is attached to the imported merchandise through the two holes located on the back, and the nib in the front. The finished product is a sandal.

According to plaintiff, "[t]he merchandise * * * consists of certain footwear referred to as 'Icicles.'" The defendant states "that this footwear is the substantially complete Icicles—in particular the 'sole' or 'bottom' without the thongs which hold the foot to the sole."

In support of its motion, plaintiff contends that "[t]he subject Icicles, in their imported condition, contain uppers which are wholly of plastics, which therefore renders them properly classifiable under TSUS item 700.58." Specifically, plaintiff asserts that "[s]hoe

uppers are those portions of the shoe that extend above the sole[,] [and] [s]ince the subject Icicles contain one plastic component which extends above the sole, the articles satisfy the requirements of TSUS item 700.58 and are therefore properly classifiable thereunder." Plaintiff explains that the nib, or protrusion of plastic "is clearly the 'upper.' "

In opposition to plaintiff's motion, and in support of the classification and its cross-motion, defendant contends that "[t]he imported footwear does not contain any upper in its condition as imported." Defendant also contends that "[e]ven if the protrusion of the imported footwear would be considered the upper or part of the upper, it is not the exterior surface of the upper."

Discussion

It is basic in customs law that "it is the function of the court to interpret the tariff acts in a manner that will fulfill or carry out the intent of Congress." *Phone-Mate,* 690 F. Supp. at 1051 (citing *Sandoz Chem. Works, Inc.* v. *United States,* 43 CCPA 152, 156, C.A.D. 623 (1956)). In determining the intent of Congress, "tariff terms are to be construed in accordance with their common and commercial meanings, which are presumed to be the same." *Nippon Kogaku (USA), Inc.* v. *United States,* 69 CCPA 89, 92, 673 F.2d 380, 382 (1982).

In support of its assertion that "[s]hoe uppers are those portions of the shoe that extend above the sole[,]" i.e., the nib or protrusion of plastic, plaintiff cites several lexicographic definitions. According to *Webster's Third New International Dictionary of the English Language* 2518 (1986), an "upper" is "the parts of a shoe or boot that are above the sole * * *." In addition, the *Dictionary of Shoe Industry Terminology,* a trade publication, defines an "upper" as "the top part of the shoe above the sole." Footwear Industries of America, *The Dictionary of Shoe Industry Terminology* (1986).

Plaintiff also notes that the Customs Service has defined an "upper," in the context of ski boots, as "that portion above the outer sole or, where there is no separate upper and outer sole, as in an injection molded plastic ski boot, that portion above the line simulating the point at which the upper and sole join." T.D. 70–238(19), 4 Cust. B. & Dec. 742, 742 (Oct. 15, 1970). More recently, Customs has stated that "for the purposes of computing the exterior surface area of an upper, the upper is everything from just below the insole level." T.D. 81–79, 15 Cust. B. & Dec. 191, 193 (Apr. 8, 1981). Hence, plaintiff asserts that "[i]t is therefore apparent that the common meaning of the term 'uppers' refers to all portions of the footwear that are above the sole."

The defendant, however, disagrees and notes "that decisions of the courts have long treated the thongs as the upper of this type of footwear." In *United States* v. *Shokai,* 14 Ct. Cust. App. 392, T.D.

42033 (1927), the imported merchandise consisted of wooden clogs. The clogs were described as:

> rectangular blocks of wood, rounded at the corners, flat on the upper side, but grooved and so cut on the under side to serve in a crude manner the purpose of a sole and heel. The clogs have three perforations through the surface, one on each side near the rear, and one in the center near the front. A thong or strap of certain fabric material runs along the upper surface from one of the holes on the rear side to the front hole in the center, and then back to the other rear hole * * *. [T]he strap on the upper side of the clog has the appearance of an inverted V * * * [and] * * * serves to catch the toes and so holds the clog on to the foot when in use.

Id. at 393. The clogs were classified as "other footwear, the uppers of which are composed wholly or in chief value of wool, cotton, ramie, animal hair, fiber, or silk," under paragraph 1405 of the Tariff Act of 1922. *See id.* Plaintiff protested the classification, and contended that the clogs were properly classifiable "as manufactures in chief value of wood, under paragraph 410." *Id.* The Customs Court sustained plaintiff's protest.

On appeal to the Court of Customs Appeals, the plaintiff contended that the clogs were not properly classifiable under paragraph 1405 because "commercially, in the United States, the fabric portion of these articles were not known as uppers." *Id.* at 395. The appellate court noted that "the sole question in this case is: Are the straps or thongs of fabric 'uppers' withing the meaning of the term as used in paragraph 1405 * * *?" *Id.* at 397. The appellate court answered the question in the affirmative, and reversed.

In reversing, the appellate court stated "that the wooden clog is the sole[,] [and] [t]he thongs or straps above the wood portion cover the foot and hold the sole to the foot." *Id.* The appellate court determined that "that portion of the fabric that extends above the sole, partially covering the foot and holding the sole in place, constitutes an upper within the common meaning of the term * * *." *Id.* Hence, in reversing the Customs Court, and in sustaining the classification by Customs, the appellate court held that "the common meaning of the term 'uppers' is broad enough to include the straps and thongs in the merchandise at bar." *Id.* at 397.

Similarly, in *United States* v. *North Am. Mercantile Co.*, 17 Ct. Cust. App. 378, T.D. 43820 (1930), the imported merchandise consisted of straw sandals. The sandals consisted of soles, made of straw and rubber, and attached thongs. *See id.* at 379. The sandals were classified by Customs "as other footwear, the uppers of which were in chief value of cotton, under paragraph 1405 of the Tariff Act of 1922 * * *." *Id.* Plaintiff protested the classification, and contended that the imported merchandise was properly classifiable "as manufactures of straw and rubber," under paragraph 1439. *Id.* The Customs Court sustained plaintiff's protest. *See id.* at 380.

On appeal, the Court of Customs and Patent Appeals reversed on the basis of *Shokai*, "the footwear consisted of wooden clogs or soles, each with a V-shaped cloth strap, made up similarly to those before us here, above the sole, to hold the clog on the foot[,] [and] [w]e held these cloth straps to be uppers." *Id.* The court concluded that "this case is ruled by United States v. *Shokai*, * * * and the judgment of the Customs Court is *reversed*." *Id.* at 381 (emphasis in original).

In this case, plaintiff submitted samples of the imported footwear, and of the finished footwear. An examination of the samples reveals clearly beyond doubt that the strap or thong, which is attached to the imported merchandise after importation, serves to hold the sole to the foot of the wearer, in the same manner as the straps or thongs in *Shokai* and *North American Mercantile*. Since the similarity is obvious and cannot be denied, the imported merchandise in this case does not contain an upper.

In customs classification cases it is often stated that "samples of the merchandise may be 'potent' witnesses." *Permagrain Prods., Inc.* v. *United States*, 9 CIT 426, 429, 623 F. Supp. 1246, 1249 (1985) (citing *Marshall Field & Co.* v. *United States*, 45 CCPA 72, 81, C.A.D. 676 (1958)), *aff'd*, 791 F.2d 914 (Fed. Cir. 1986). An examination of the imported merchandise indicates that the nib or protrusion is not an upper, but rather is part of the sole. The nib is of the same plastic material as the sole, and contains a hole through which the strap or thong is attached to the sole.

In support of the Customs classification, defendant presented the affidavits of Mr. George Langstaff, formerly the executive vice president and general manager of the footwear sector of Genesco, Inc., and Mr. Jacob Barrocas, manufacturing vice president of Injection Footwear Corp. Mr. Langstaff stated that he was "familiar with the type of footwear known and sold as 'Icicles[,]' * * * [and] intimately familiar with industry terminology regarding footwear * * *." Mr. Barrocas stated that he had been "involved with our manufacture of sandals identical to Icicles, * * * [and was] intimately familiar with footwear terminology and practice."

In their affidavits, both Mr. Langstaff and Mr. Barrocas stated that "in its condition as imported the footwear does not have an upper, as the industry recognizes that the upper must: (a) enclose the top portion of the foot; (b) hold the foot to the sole; and/or (c) protect the top and sides of the foot." They also stated "that the soles or bottoms of the Icicles are substantially complete footwear, as the addition of the thongs after importation is a minimal operation—merely running the thong through the three holes."

Pursuant to General Interpretative Rule 10(h), Customs has classified the merchandise as "substantially complete" footwear. Rule 10(h) provides that "unless the context requires otherwise, a tariff description for an article covers such article, * * * whether finished or not finished * * *." Case law teaches that "[t]o ascertain whether an article can be classified as unfinished under Rule 10(h), the court

must determine if the merchandise is 'substantially complete.' " *Channel Master, Div. of Avnet, Inc.* v. *United States,* 10 CIT 684, 688, 648 F. Supp. 10, 14 (1986) (citing *Authentic Furniture Prods., Inc.* v. *United States,* 68 Cust. Ct. 204, 211, C.D. 4362 (1972), *aff'd,* 61 CCPA 5, C.A.D. 1109, 486 F.2d 1062 (1973)). 856 F.2d 177 (Fed. Cir. 1988).

Whether or not imported footwear is "substantially complete" is a question that has been previously litigated. Although the factors that are to be considered in determining whether an importation is "substantially complete" may be easy to articulate, and are set forth in *Daisy-Heddon, Div. Victor Comptometer Corp.* v. *United States,* 66 CCPA 97, 102, C.A.D. 1228, 600 F.2d 799, 803 (1979), their application to particular importations may not always be free from doubt.

For example, in *Simod Am. Corp.* v. *United States,* 12 CIT ——, 693 F. Supp. 1172 (1988), *rev'd,* 872 F.2d 1572 (Fed. Cir. 1989), the imported merchandise consisted of shoe uppers containing an "underfoot," a piece of material sewn on the bottom of the upper. The underfoot served to hold the imported footwear onto the lasts of the Desma machine, a machine located at the plaintiff's United States factory which finished the footwear "by the production and addition of soles through a polyurethane injection molding process." 693 F. Supp. at 1175. After the soles were added by the Desma machine, the merchandise was cleaned, labelled, "packaged and put into a condition suitable for retail sale." *Id.* The Customs Service determined that as imported, the merchandise constituted "substantially complete" footwear, and, therefore, was properly classifiable as "unfinished footwear," since under General Interpretative Rule 10(h), "a tariff description for an article covers such article * * * whether finished or not finished * * *." The plaintiff contested the classification, and contended that the imported merchandise was not "substantially complete" unfinished footwear, but consisted only of shoe "uppers."

This court applied the various *Daisy-Heddon* factors, and determined that a greater number of components of the merchandise were added before importation than after, and concluded that, as imported, the footwear was "substantially complete." *See id.* at 1177. This court also noted that the completion of the imported merchandise into footwear, which occurred at the plaintiff's United States factory, was accomplished by the Desma machine, which "produced and attached a sole by making two injections of polyurethane onto the bottom of the imported merchandise." *Id.* The court added that "[i]n contrast to the labor-intensive craftsmanship demonstrated at the Italian stitching rooms [before importation], the [United States] factory procedure was highly industrialized." *Id.* at 1178. On the record evidence, the court determined that plaintiff "expended more time and effort in the production of the shoes into their imported condition than in finishing them at the [United

States] factory." *Id.* It was also noted that "[a] viewer of the imported merchandise would immediately recognize it as athletic footwear." *Id.* at 1179. Hence, this court sustained the Customs classification.

On appeal, however, the appellate court discussed the details of the manufacturing process accomplished by the Desma machine, a sophisticated machine costing between $800,000 and $1,000.000, and determined that more time, effort, and money were expended in completing the merchandise after importation. *See* 872 F.2d at 1576–78. In its analysis of the *Daisy-Heddon* factors, the appellate court stated that "the trial court ignored the capital-intensive nature of the [United States] manufacturing plant[,]" and concluded that "[t]he fact that the [United States] operation was largely mechanized does not detract from the substantial nature of the manufacturing efforts undertaken there." *Id.* at 1577.

From its own examination of the imported merchandise, the appellate court observed that "while it clearly is embryo footwear, it is also clearly in the infant stages of manufacture[,]" and that it did not constitute "substantially complete" footwear. *See id.* at 1578. Nonetheless, the appellate court stated that "we are unable on the present record * * * to discern what the true classification should have been[,]" and reversed the decision of this court, and remanded. *Id.* at 1578–79. On remand to this court, the case was remanded to the Customs Service for reclassification. *See Simod Am. Corp.* v. *United States,* 13 CIT ——, Slip Op. 89–72 (May 25, 1989). On July 18, 1989, the Customs Service reclassified the imported merchandise in accordance with the plaintiff's claimed classifications.

In the present case, however, the sometimes difficult question of determining whether imported footwear is "substantially complete," is not presented since it is conceded that, as imported, the merchandise at issue constitutes "substantially complete" footwear.

In its opposition to defendant's cross-motion, plaintiff maintains that "[d]efendant * * * contends that the classification of the subject Icicles must be determined on the basis of their condition after they are completed and ready for sale—that is, with the laces (or thongs) attached." According to plaintiff, "[a]ssuming defendant's theory is sustained, then plaintiff is entitled to partial summary judgment with regard to that portion of the merchandise that was laced with plastic laces after importation."

The imported merchandise, however, pursuant to General Interpretative Rule 10(h), was properly classified in its condition as imported, as "substantially complete" footwear. Hence, plaintiff's alternative argument need not be discussed.

Conclusion

In view of the foregoing, it is the determination of the court that there are no genuine issues of material fact, and that plaintiff has not overcome the presumption of correctness that attaches to the

classification by Customs. Hence, since the imported merchandise was properly classified by Customs as "[o]ther footwear," under item 700.60, TSUS, with duty assessed at the rate of 20 per centum *ad valorem*, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

(Slip Op. 90-47)

AMERICAN MOTORISTS INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-03-00237

OPINION

Held: Where Customs Service sent to plaintiff, surety for an import bond, a demand for payment after principal obligor importer defaulted, which demand identified importer and listed for each entry under the bond the entry number, bill number, bill date, billing location, document date, amount due, and age of the bills, but did not include copy of bond, the demand was sufficient notice of liability under 19 U.S.C. § 1514(c)(2). Plaintiff failed to prove a practice of Customs of sending copy of bond with every formal demand for payment. Because plaintiff failed to protest liability within statutorily required time period after mailing of demand for payment, its eventual protest was untimely filed; plaintiff's complaint is therefore dismissed.

(Decided May 10, 1990)

Russotti & Barrison (Harvey Barrison) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Al J. Daniel, Jr.*), for defendant.

BACKGROUND

MUSGRAVE, *Judge:* The plaintiff in this case is a surety for a general term import bond placed with the Customs Service ("Customs") by an importer and covering the import into the United States of two entries of merchandise at issue here. After liquidation of the merchandise, Customs sent to the plaintiff on August 11, 1986 a document titled "Formal Demand on Surety" stating that the principal debtor under the bond, the importer, had not paid the import duties due on the merchandise covered by the bond and requesting that the surety pay the amounts due pursuant to its obligation under the bond. Accompanying that document was a computer printout that provided the name and identification number of the importer, and listed for each overdue entry bill the entry number, bill number, bill date, billing location, "document date", amount due, and "age category" of the respective bills.

Under 19 U.S.C. § 1514(c)(2), a decision of a customs officer as to charges or exactions on imported merchandise is deemed conclusive against, *inter alios*, a surety on an import bond unless the affected surety files a protest of that decision within 90 days from the mailing by Customs of a "notice of demand for payment" in accordance

with that statutory provision. The defendant asserts that the August 11 communication constituted a "notice of demand for payment" within the meaning of 19 U.S.C. § 1514(c)(2). The plaintiff contends that it did not.

The plaintiff filed a protest denying liability under the bond on July 31, 1987 in which it claimed that the bond had undergone material alterations and that its surety obligations under the bond were therefore discharged; the plaintiff also contested Custom's classification of the imported merchandise. The defendant argues that because that protest was filed well in excess of 90 days after Customs sent the August 11, 1986 communication, the protest was untimely filed and that consequently the determination by Customs of the plaintiff's liability is conclusive under 19 U.S.C. § 1514(c)(2). The plaintiff denies that the August 1986 communication was effective as a notice of demand for payment, alleging that it was instead a later communication from Customs, sent on July 8, 1987, that constituted a demand in accordance with the statute. Because the plaintiff's July 31, 1987 protest was filed within 90 days of this latter date, the plaintiff contends that its protest was timely filed under the statute and that Customs' refusal to consider the protest was improper.

The central issue in this case, then, is whether the August 1986 communication was a legally effective demand, so as to begin the 90-day period within which a protest was required to be filed, or was not effective, in which case the July 1987 demand began the 90-day period. The plaintiff contends that the 1986 communication was ineffective as a formal demand because Customs did not include with the communication "copies of the bond, entry papers and other relevant documents". Plaintiff's Brief at 6. The 1987 communication from Customs was accompanied by "copies of the respective bills, entries and bonds", Plaintiff's Exhibit A, and the plaintiff contends that it was therefore the later communication that constituted effective notice of demand for payment. Asserting that its protest was therefore timely filed, the plaintiff invokes the jurisdiction of this Court under 28 U.S.C. § 1581(a) and (i) to request that the Court find the merchandise to have been improperly classified and order its reliquidation in accordance with the plaintiff's proposed classification, and that the Court adjudge the bond at issue to be null and void due to the alleged alteration and hold the plaintiff to be consequently relieved of liability under the bond.

At the time the present action was filed, there were pending before this Court two other cases that involved the same or substantially the same issue presented here: *American Motorists Insurance Co.* v. *Villanueva,* 12 CIT ——, 703 F. Supp. 104 (1988). This Court therefore delayed rendering a decision in the instant action pending consideration by the Court of Appeals for the Federal Circuit of appeals from those related decisions. The Court of Appeals subsequently affirmed those decision, upholding the liability of the sure-

ty in each case. *American Motorists Insurance Co.* v. *Villanueva,* 880 F.2d 409 (1989); *Peerless Insurance Co.* v. *United States,* 891 F.2d 298 (1989). Those decisions dictate the same result in the present case.

The Court finds that the August 1986 communication constituted effective notice of demand on the plaintiff for payment under the bond and that the plaintiff's July 1987 protest was therefore not timely filed with Customs. Consequently, the determination by Customs of the plaintiff's liability is conclusive under 19 U.S.C. § 1514(c)(2).

Discussion

1581(a)

This Court has jurisdiction under 28 U.S.C. § 1581(a) over denials by Customs of protests filed under 19 U.S.C. § 1515. The subjects of and procedures for filing § 1515 protests are prescribed in 19 U.S.C. § 1514. Among the protest categories covered by the latter section is the type of protest filed by the plaintiff, and denied by Customs, in this case: protests of "(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury". Subsection (c)(2) of section 1514 establishes the 90-day time period, noted above, within which a protest provided for by that section must be filed. The standard for determining whether a purported notification of delinquency and demand for payment constitutes a formal "notice of demand for payment against [a surety's]bond" within the meaning of section 1514(c)(2) was stated by this Court in *Old Republic Insurance Co.* v. *United States,* 10 CIT 1, 625 F. Supp. 983 (1986). To qualify under that standard, a demand for payment must "provide a surety sufficient means of ascertaining the bond on which demand for payment is being made". *Id.* at 4–5, 625 F. Supp. at 986. The communication sent by Customs to the surety in *Old Republic* was similar to the one Customs mailed to the plaintiff in the present case. It included a computer printout listing numerous bonds on which payment from the surety was requested. An accompanying letter stated that the amounts due on the listed bonds had not been paid by the principals thereon after demands on the principals and that the addressee surety was an original promisor on the bonds; the letter then stated, "This is a formal demand upon you for immediate payment of the amounts noted on the enclosures hereto". *Id.* at 2, 625 F. Supp. at 984. The enclosed computer printout listed for each bond or bill the bill number, the billing date, the port of entry, and the amount due. The printout did not provide the names and addresses of the delinquent principals or the entry numbers for the bills and corresponding merchandise, nor did the communication include a copy of the relevant bonds. A subsequent communication from Customs to the surety identified the principals and entry numbers and included copies of the bonds.

The Court in *Old Republic* found, contrary to the government's contention there, that the earlier communication was not a sufficient notice of demand for payment against the bond at issue, because of the absence from that communication of the information noted above. Consequently, the Court held that the 90-day period within which the surety's protest had to be filed was not begun until the later communication which *did* include that information, and the Court therefore denied the government's motion to dismiss the surety's challenge of liability as untimely filed relative to the earlier communication.

The plaintiff surety in the instant action argues for the same result here based on similar reasoning. An examination of the *Old Republic* and subsequent opinions and of the particular facts at issue in this case, however, shows that a different result is required here.

In *American Motorists,* 706 F. Supp. 923, the plaintiff American Motorists was a surety for bonds on which 113 outstanding claims against principals had accrued. Customs sent to the surety several notices of delinquency and demands for payment of the outstanding amounts, to which the surety either did not respond at all or submitted a rambling, obfuscatory response. Thereafter, Customs, concluding that the response filed did not constitute an adequate defense to the claims, formally designated the company as delinquent and temporarily refused to accept new bonds from it.

The notices sent to the surety contained, *inter alia,* the relevant claim numbers; port name and code; broker number; name, address, and identification number of the principal; date of entry; entry number; description of merchandise; and payment amount. A copy of the bond and entry documents were included in some, but not all, of the notices. In seeking a preliminary injunction to prevent Customs from refusing to accept new bonds from it, the surety essentially argued that it had not received sufficient notice under 19 C.F.R. § 113.38(c)(4) (requiring that a surety be provided notice of delinquency and opportunity to respond before Customs may refuse to accept new bonds from the surety), because each and every notice sent by Customs did not contain, in addition to the above information, a copy of the relevant bonds. The Court dismissed that argument, holding that the information provided in the notices, including the notices not accompanied by copies of the bonds, was adequate to enable the surety itself to obtain additional copies of the bonds if it so desired, and in any event to sufficiently identify the particular transactions involved so as to enable it to respond to Customs' enquiries.

The context of the earlier *American Motorists* case is somewhat different from that presented here in that the earlier decision turned on a determination of the sufficiency of notice under the *regulation* 19 C.F.R. § 113.38(c)(4), while the present case requires such a determination under the *statute* 19 U.S.C. § 1514. The Court stated in the earlier *American Motorists* opinion that the requirements

for sufficient notice under the C.F.R. regulation involved there are less stringent than the requirements under the statute involved here.

Nevertheless, the earlier *American Motorists* opinion is useful in the present case, not only because of the substantial similarity of the facts presented in the two cases, but also because of the construction in that opinion of the *Old Republic* decision and its notice criterion. The Court stated in *American Motorists,*

> It cannot be said that *Old Republic* established an inflexible rule which categorically requires Customs to enclose a copy of the bond for each notice of claim and each notice of demand for payment.

12 CIT at ——, 706 F. Supp. at 928. Instead, the Court interpreted *Old Republic* as requiring just what it purports to require: that Customs provide whatever information is necessary in a given case to provide a surety with sufficient means of ascertaining the bond or bonds on which demand for payment is being made. *Id; Old Republic,* 10 CIT at 4–5, 625 F. Supp. at 986. Depending upon what other information is provided in the notice and demand, this requirement may or may not include copies of the relevant bonds. The Court of Appeals for the Federal Circuit has affirmed the *American Motorists* opinion. 880 F.2d 409.

The *Peerless* case involved facts even more similar to those presently presented than did *American Motorists.* In *Peerless,* Customs had mailed to the surety Peerless a letter making formal demand for payment of overdue duties unpaid by the importer principals. Attached to the letter was a computer printout listing the bills due, and providing for each bill the name and address of the delinquent debtor, the bill number billing date, port name, document date, entry number, amount due, and importer number. Subsequently, Customs sent Peerless another delinquency letter containing essentially the same information, and then a third letter providing, in addition to the above information, a copy of the particular bond and entry form at issue. Peerless did not file a protest of liability under 19 U.S.C. § 1514 (the statute involved in the present case, in contrast to the *regulation* involved in the earlier *American motorists* case) until well beyond 90 days after receiving the first two delinquency notices and demands for payment. Peerless contended, however, that because neither of those communications contained copies of the relevant bond, it was only the third communication, containing such a copy, that constituted effective notice to begin the 90-day period under 19 U.S.C. § 1514.

The Court rejected that argument as it did in *American Motorists.* The Court in *Peerless* found that with the information contained in the initial demand for pyament, the surety could have obtained a copy of the bond from the customhouse at the port of entry where the bond was originally filed. Moreover, the Court stated that "no-

tice to a surety for payment is not rendered insufficient merely because the record-keeping practices of the surety are inadequate." 12 CIT at ——, 703 F. Supp. at 106 (citing *Magee* v. *Manhattan Life insurance Co.*, 92 U.S. 93, 98 (1875)). The Court of Appeals for the Federal Circuit affirmed that decision as well. 891 F.2d 298.

The computer printout sent to the plaintiff in the present case is substantially identical to that found by the Court in *Peerless* to constitute sufficient notice under the statute. As noted earlier, it provided the name of the delinquent debtor importer and the importer's identification number; for each of the overdue bills, it also listed the entry number, the bill number, the billing location, the bill date, the "document date", the amount due-listing separately for each bill the total amount, principal amount, and interest amount due, and the "age category" of the bills-either 60, 90, or 120 days, or longer. This Court flatly rejects any notion that with this information but without a copy of the bond itself on which demand for payment was being made, the plaintiff was unable to ascertain the identify of that bond. Information almost identical to this was held in *Peerless* to constitute sufficient notice under the same statute involved in this case. Pursuant to that precedent, and for the same reasons, the Court reaches the same conclusion here.

Plaintiff asserts that until Customs rejected its protest in this action, "Customs had accepted as timely filed protests that were received with 90 days of the date of the mailing of a letter of demand for liquated increased duties which was accompanied by the documentation involved in the entry. [American Motorists] was never informed that this practice would stop until the denial of the instant protest * * *." Plaintiff's Brief at 3. In support of this contention, the plaintiff cites an affidavit submitted by its own attorney-in-fact in this action, Mr. John J. Sheppard, in which he states,

> As long as I have been in the business it has been the practice of the U.S. Customs Service that a claim was made upon a surety only by means of a formal and specific letter of demand accompanied by a copy of the bond, entry and bill.

Plaintiff's Exhibit D. With regard to the plaintiff's desire for a "formal and specific letter of demand", the Court notes, in addition to the information provided in the computer printout, the following language in the accompanying August 11 letter:

> *This is a formal demand upon you for payment of the amount(s) noted on the enclosure(s)* totaling $4,225,865.34 [then stating separately the principal and interest amounts] due to the United States Customs Service by principal(s) for whom you are surety and which were due and payable on the dates indicated in the enclosure(s). Formal demands were made on the principal(s) involved but the bill(s) remains unpaid as of July 31, 1986. Under the terms of your bond you are an original promisor and debtor with each of your principals.

Defendant's Exhibit B (emphasis added). The defendant argues:

> It is difficult to imagine how [that letter] could have employed the English language more effectively or directly than it did. It squarely said to plaintiff American Motorist two things: (1)the principal on your bond has *not* paid and (2) therefore, you *must* pay. Those clear assertions, coupled with the specific and detailed information concerning the entries, bills, and amounts, could have been ignored by plaintiff only at its peril. It should not be heard to say that it felt comfortable ignoring Customs' demands until [Customs] threatened to take formal action to terminate plaintiff's customs bond-writing activity before it had to do anything toward honoring its financial obligations under its delinquent bonds.

Defendant's Brief at 7. The Court agrees.

In addition to the affidavit of its attorney, the plaintiff cites, to support its allegation of a "practice" of Customs of making formal claims on sureties only by communications containing copies of the underlying documents, an excerpt from the deposition testimony of a Customs official in an unrelated bankruptcy case. The Court does not find this excerpt persuasive. In any event, the plaintiff's allegation is contradicted by this finding in *Peerless*:

> Since at least 1977, Customs has made its demands for payment upon sureties using computerized printouts which identify the name and address of the delinquent importer, the bill number, billing date, port of entry, document date, entry number, the amount due, and the importer number.

12 CIT at ——, 703 F. Supp. at 105. The plaintiff has presented no evidence that convinces the Court that plaintiff's alleged "practice", rather than that found by the Court in *Peerless*, reflects the methods actually followed by Customs. Moreover, the plaintiff could in any event have protected itself by responding to the clearly denominated formal demand of August 11 with at least an enquiry as to the future procedures to be followed if the already unpaid and overdue charges were allowed to remain delinquent.

These findings concerning Customs' notice and demand methodology "[s]ince at least 1977" also defeat the plaintiff's contention that the methodology contravenes the Administrative Procedure Act ("APA"). The plaintiff characterizes the methodology as a "change in procedure", and as an exercise of "rulemaking procedures" which under the APA may generally be undertaken only after notice and an opportunity to comment is provided to the public. 5 U.S.C. § 533; Plaintiff's Brief at 7–8. Because the Court concludes that there was no "change" in Customs formal notice and demand methodology, it is not necessary to consider whether such methodology constitutes a "rule" within the meaning of the Administrative Procedure Act. Even assuming that it does, there was no change,

and therefore there could have been no rule "making" to invoke the procedural prerequisites of the APA.

Even more unfounded is the claim that the methodology is "arbitrary, capricious, and an abuse of discretion" under the APA. The plaintiff supports this claim by arguing that "Customs failed to articulate any rational basis for the change" and "has applied it retroactively", "encourag[ing] [the plaintiff] to rely on past practice * * *." Plaintiff's Brief at 10. Aside from the controlling fact that the Court finds no change in procedures to invoke the APA, the Court has the most serious doubts, given the substantial amount of information provided in the communication received by the plaintiff, as the plausibility of asserting that a failure to supplement this information with a copy of the underlying bond rises to the level of being arbitrary and capricious or an abuse of discretion, the standard of review under the APA that is most deferential to the agency's discretion. 5 U.S.C. § 704.

Finally, also without merit is the plaintiff's contention that Customs' methodology violates the APA "in that it was not within the proper construction of the enabling statute and violated the spirit of the expressed Congressional intent." Plaintiff's Brief at 11. The statute plaintiff refers to is the 1979 amendment to 19 U.S.C. § 1514, extending to 90 days the period of time in which sureties and other persons may protest liability under import bonds. The Court states in *Peerless* that this amendment was prompted by a "concern that sureties were not receiving *timely* notice, rather than [that they were receiving] *insufficient* notice." 703 F. Supp. 105 (emphasis added); *see* S. Rep. No. 249, 96th Cong. 1st. Sess. 254, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381,640. The information provided by Customs' August 11 communication was quite sufficient, and the plaintiff was thereby provided with timely notice; therefore, the "spirit of the expressed Congressional intent" in the amendment is not violated.

In addition to the procedural infirmities of the plaintiff's complaint, the Court notes an apparent substantive incongruity therein. The plaintiff alleges as part of its complaint that one of the bonds at issue was materially altered in that a "rider" was incorporated into the bond (by an "x" marked in a pre-printed box on the bond providing for such incorporation) without the plaintiff's consent. However, the bond also contains a stamped statement that "All corrections and alterations [to the bond] were made prior to the signing of the bond", which statement is initialed by the plaintiff's attorney-in-fact, Mr. John J. Sheppard, who also signed the bond itself on the plaintiff's behalf, and whose affidavit the plaintiff offered to the Court as evidence. Nowhere has the plaintiff attempted to explain this apparent anomaly. Moreover, the plaintiff has not explained how the alleged unauthorized alteration of the bond, even if proved, prejudiced the plaintiff.

In accordance with its conclusions that the August 11 letter and printout were sufficient notice of demand under 19 U.S.C. § 1514, and that the plaintiff failed to prove a practice on the part of Customs of always enclosing a copy of the relevant bond and/or other documents in communications meant to constitute a formal demand, the Court finds that the plaintiff's protest was not timely filed under 19 U.S.C. § 1514(c)(2) as required by 28 U.S.C. § 2631(a), and that the denial by Customs of that protest is therefore conclusive under 19 U.S.C. § 1514(a). Consequently, the plaintiff is barred from maintaining this action under 28 U.S.C. § 1581(a). *Computime, Inc.* v. *United States,* 8 CIT 259, 601 F. Supp. 1029 (1984), *aff'd.* 3 Fed. Cir. (T) 175, 772 F.2d 874 (1985); *Star Sales & Distributing Corp.* v. *United States,* 10 CIT 709, 663 F. Supp. 1127 (1986); *Omni U.S.A.* v. *United States,* 11 CIT 480, 482, 663 F. Supp. 1130, 1132 (1987), *aff'd,* 6 Fed. Cir. (T) 99,840 F.2d 912 (1988), *cert. denied,* 109 S. Ct. 56 (1988).

1581(i)

The plaintiff also asserts jurisdiction under 28 U.S.C. § 1581(i), seeking thereunder a declaratory judgment that the bond covering the entries here involved is null and void. Plaintiff's Brief at 16. It is settled as a general rule that the jurisdiction of this Court under section 1581(i), is, as stated in subsection (i) itself, "in addition to the jurisdiction conferred * * * by sections 1581(a)–(h)". The Court of Customs and Patent Appeals, predecessor to the Court of Appeals for the Federal Circuit, has held that subsection (i) is "not to be used generally to bypass administrative review by meaningful protest." *United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 183–84, 697 F.2d 467, 472 (1982). In *Uniroyal,* the Court of Customs and Patent Appeals held that section 1581(i) jurisdiction was not available to the plaintiff in that case for a declaratory judgment, because the Court determined that the plaintiff had available but failed to utilize an adequate remedy under section 1581(a). *See also Norcal/ Crosetti Foods, Inc.* v. *United States,* 14 CIT ——, Slip Op. 90–13, page 13 (Feb. 12, 1990).

The present case is analogous to *Uniroyal,* and that decision therefore dictates a similar outcome here. The plaintiff here sought relief under section 1581(a), but failed to do so in the timely manner prescribed in 19 U.S.C. § 1514. Having failed to properly avail itself of that remedy, the plaintiff can not now escape the consequences of that failure by seeking alternatively to invoke the jurisdiction of this Court under 28 U.S.C. § 1581(i).

The plaintiff contends that should the Court find its request for a declaratory judgment to be "preempted" under the general rule stated above, the Court still may exercise jurisdiction under 1581(i) pursuant to the exception to the general rule recognized for situations in which 1581(a) or other established jurisdictional bases are "manifestly inadequate". However, the plaintiff fails to demon-

strate how the normal protest procedures under 19 U.S.C. § 1514 and 28 U.S.C. § 1581(a) would have been inadequate in this case. The plaintiff argues that because the present case only involves two of numerous entries under the bond at issue, if this Court finds the bond to be invalid the plaintiff would then be in the "anomalous position" of having to protest any demands for payment on the other entries by first paying the full amount due on those entries. Plaintiffs Brief at 19.

As stated herein, the Court will not here declare the bond to be invalid, because the plaintiff has not properly followed the procedures for protesting its liability and invoking this Court's jurisdiction. Therefore, the plaintiff will not find itself in such an anomalous position. As the Court of Appeals for the Federal Circuit stated in *Uniroyal*, "[the plaintiff's] belief that it had no remedy under § 1581(a) would not make that remedy inadequate. [The plaintiff] simply made no attempt to use it." 687 F.2d 467, 1475.

CONCLUSION

Under the relevant statutory provisions and the cited decisions of this Court and the Court of Appeals for the Federal Circuit, the communication that Customs sent to the plaintiff on August 11, 1986 clearly was sufficient to inform the plaintiff of the fact and the details of its liability under the bond for the amounts due on the entries. On the facts of this case, if the plaintiff wished to protest its liability, it was required to do so in the manner prescribed by Congress in 19 U.S.C. § 1514 and thereafter to bring any complaint before this Court under the corresponding jurisdictional provision 28 U.S.C. § 1581(a). Having failed, even within the additional time period provided by the 1979 amendment, to timely file a protest as prescribed by § 1514, and having failed to show the inadequacy of that standard statutory remedy, the plaintiff is precluded from now circumventing those standard procedures and availing itself of the Court's jurisdiction by other avenues. To permit such a maneuver would be to contravene the statutory framework established by Congress. Accordingly, the plaintiff's complaint is dismissed.

(Slip Op. 90-48)

BROSTERHOUS, COLEMAN & CO. A/C LURGI CHEMIE UND HUTTENTECHNIK GMBH, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-04-00308

Where the contract between a foreign seller and domestic buyer did not require the seller to purchase materials from foreign vendors, and the seller chooses foreign vendors, the contract between the United States purchaser and the seller was not the sale for exportation to the United States which should be used for calculating transaction value.

Merchandise entered in multiple shipments is not properly classifiable as an entirety even where a single shipment was not possible.

[Plaintiffs' motion for summary judgment is granted in part and denied in part. Defendant's cross-motion for summary judgment is denied in part and granted in part. Remanded.]

(Decided May 11, 1990)

***Ross & Hardies (Joseph S. Kaplan)* for plaintiff.**

***Stuart M. Gerson,* Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(John J. Mahon)*; United States Customs Service *(Steven Berke),* for defendant.**

DICARLO, *Judge:* Plaintiffs, Brosterhous, Coleman & Co., and Lurgi Chemie und Huttentechnik GmbH, challenge the valuation and classification of components of a chlorine dioxide bleach plant imported for integration into a paper-making operation in the United States. The action is before the court on cross-motions for summary judgment. This court has jurisdiction under 28 U.S.C. §1581(a) (1982).

The Court holds that the proper basis for calculating transaction value is the prices Lurgi agreed to pay its vendors for the components of the plant. The Court also holds that Customs properly declined to classify the components as an entirety. Accordingly, plaintiffs' motion for summary judgment is granted in part and denied in part. The government's cross-motion for summary judgment is denied in part and granted in part. The action is remanded to Customs for recalculation of transaction value consistent with this opinion.

BACKGROUND

Crown Zellerbach Corp., a domestic producer of paper, contracted with plaintiff Lurgi, a West German corporation, requiring Lurgi to design, fabricate and supervise the construction of a chlorine dioxide bleach plant at Crown's paper-making facility in Camas, Washington. The contract gave precise technical specifications for the components, but did not specify the vendors who would supply the components or the countries from which they would be purchased. Lurgi contracted with vendors in the Federal Republic of Germany for the manufacture of the components and plaintiff Brosterhous, a licensed customshouse broker, imported them for Lurgi. The equipment was imported in 21 shipments which entered the United States between October 1982 and August 1984.

DISCUSSION

On a motion for summary judgment, the court's function is to determine whether there are any factual disputes that are material to the resolution of the action. When ruling on cross-motions for summary judgment, if there are no genuine issues of material fact, the

court must decide whether either party has demonstrated its entitlement to judgment as a matter of law.

I. *Valuation:*

The parties agree that Customs correctly used transaction value as the basis for calculating duties. Transaction value is "the price actually paid or payable for the merchandise *when sold for exportation to the United States*" plus certain adjustments. 19 U.S.C. § 1401a(b) (1988) (emphasis added). A sale for exportation to the United States may occur even where the purchaser is outside the United States. *E.C. McAfee Co.* v. *United States,* 842 F.2d 314, 318 (Fed. Cir. 1988) (citing *United States* v. *Getz & Co.,* 55 CCPA 11, 18, C.A.D. 927 (1969)). A determination as to which sale is for exportation to the United States is fact-specific and can only be made on a case-by-case basis. *E.C. McAfee,* 832 F.2d at 319. When there is more than one sale for exportation, Customs policy is that transaction value should be calculated according to the sale which most directly caused the merchandise to be exported to the United States. *See, e.g.,* C.S.D. 84-54, 18 Cust. Bull. 979 (Dec. 1, 1983); C.S.D. 83-95, 17 Cust. Bull. 930 (May 16, 1983); CLA-2 CO:R:CV:V 542928 BLS, TAA #57 (Jan. 21, 1983).

Plaintiffs claim that Customs improperly calculated transaction value by using data derived from the sale between Lurgi and Crown rather than the sales between Lurgi and its suppliers. The government counters that the contract between Crown and Lurgi is the proper basis for calculating transaction value because it was the transaction most directly causing the exportation.

The contract between Crown and Lurgi did not require Lurgi to purchase the plant components from a particular vendor or country. It did not preclude Lurgi from purchasing the components from vendors in the United States. In affidavits, Lurgi and Crown personnel state that Lurgi was free to choose vendors in any country. *See* Plaintiff's Memorandum In Support of Its Motion For Summary Judgment, Exhibit A ¶7, Exhibit B ¶6. The government argues that, as a West German firm, Lurgi could be expected to purchase the components from vendors in its own country. Defendant's Opposition To Plaintiff's Motion For Summary Judgment And Cross-Motion For Summary Judgment In Its Favor, 12.

In addition, the government points to a provision in the contract stating:

> The compensation indicated above * * * is understood to be for delivery of equipment and the engineering package c.i.f. Camas, Washington, including adequate packing as necessary, unloading not included. Customs duties up to 3.5% applying customs tariff No. 661.67 covering pulp paper machinery is also included. All other taxes, fees or expenses payable in the U.S.A. shall be paid and borne by Buyer.

The Court believes this provision means that duties, if incurred, would be the responsibility of the seller up to 3.5% of the contract price. Any duties above that amount would be the responsibility of the buyer. This provision alone does not appear to require the merchandise to be imported. Rather, it stipulates the circumstances under which each party bears the responsibility of paying duties should the merchandise be imported.

To refute the affidavits, the government "must set forth specific facts showing that there is a genuine issue for trial." Rule 56(f) of the Rules of this Court. The contract provision is insufficient to meet that burden. Consequently, the Court finds that Lurgi could have purchased the components in the United States and was under no obligation to purchase components from any particular vendors or from vendors in any particular country. Here, it was not until Lurgi had decided which vendors would supply the components that any importation became necessary.

Under these facts, the Court finds that the transaction between Crown and Lurgi was not the sale for exportation that most directly caused the merchandise to be exported to the United States. The transactions between Lurgi and its vendors are, therefore, the sales for exportation for purposes of calculating transaction value under 19 U.S.C. § 1401a(b) (1988).

The determinations upon which the government relies to support its position that the contract between Crown and Lurgi is the sale which most directly caused the exportation are inapposite. In C.S.D. 84–54, a United States company entered into a contract to purchase shoes from an English company that, in turn, purchased the shoes from a manufacturer in El Salvador. The manufacturer in El Salvador was to ship the merchandise directly to the United States. C.S.D. 84–54, 18 Cust. Bull. at 979. In C.S.D. 83–95, a United States company ordered shirts from a supplier in Hong Kong who would deliver them to the buyer in Hong Kong. The distributor purchased the merchandise from a manufacturer in the People's Republic of China. C.S.D. 83–95, 17 Cust. Bull. at 931. *See also* CLA-2 CO:R:CV:V 542928 BLS, TAA #57 (Jan. 21, 1983) (sale by Virgin Island distributor of cooking equipment manufactured in Asia to United States buyer).

In each instance, Customs determined that the sale for exportation was the transaction between the United States customer and the foreign distributor. *See* C.S.D. 84–54, 18 Cust. Bull. at 980; C.S.D. 83–95, 17 Cust. Bull. at 932; TAA #57 at 3. In each case, however, the contract with the United States purchaser contemplated that the merchandise would be imported.

The reasoning of the Federal Circuit in *E.C. McAfee Co.* v. *United States*, 842 F.2d 314 (Fed. Cir. 1988), appears to support the conclusion that the sale between Crown and Lurgi should not serve as the basis for calculating transaction value. *E.C. McAfee* concerned the valuation of made-to-measure clothing sold by distributors in Hong

Kong to United States customers. The Hong Kong distributors supplied customer measurements and fabrics to tailors who manufactured the clothing and delivered it to the distributor who packaged and shipped the finished product to the United States. *Id.* at 316.

The *E.C. McAfee* court found that transaction value should be based on the price the distributor paid the tailor because "the reality of the transaction between the distributors and the tailors is that the goods, at the time of the transaction between the distributors and tailors, are 'for exportation to the United States.' " *Id.* at 319. The court based its conclusion on the finding that from the time of the initial contact until eventual importation, the goods in question were being made for a specific United States consumer, not the United States market generally. *Id.* According to *E.C. McAfee,* this fact "compell[ed]" a reversal of the trial court's conclusion that the goods were not for exportation to the United States at the time of assembly. *Id.*

E.C. McAfee did not set out a bright-line test. The court stated that "[a] determination that goods are being sold or assembled for exportation to the United States is fact-specific and can only be made on a case-by-case basis." *Id.* The Court is aware that *E.C. McAfee* involved the interpretation of a regulation and somewhat different facts. Nevertheless, the Court finds the Federal Circuit's reasoning to be supportive. Furthermore, the facts in this case and *E.C. McAfee* are analogous. Lurgi carefully chose the components specifically for Crown. From the moment that an agreement was reached between Crown and Lurgi, Lurgi chose components for Crown rather than the United States market generally. As in *McAfee,* the components were "for exportation to the United States" at the time they were purchased by Lurgi from its vendors.

II. *Classification:*

Plaintiffs challenge the classification of the individual components under various provisions of the Tariff Schedule of the United States arguing that the merchandise is properly classified as an entirety under item 668.00, TSUS, which covers "[m]achines for making cellulosic pulp, paper, or paperboard * * *." Plaintiffs state that the size of the subject merchandise made it impossible to transport in one shipment. Plaintiff's Memorandum In Support Of Its Motion For Summary Judgment, 4 (¶16). Plaintiffs argue that, where a single shipment is impossible, the doctrine of entireties should not be applied to preclude the classification of separately shipped merchandise as one item.

Plaintiffs submitted briefs prior to the court's decision in *KMW Johnson, Inc.* v. *United States,* 13 CIT ——, 728 F. Supp. 754 (1989). In *KMW Johnson,* the court rejected this argument with respect to components of the dryer section of a paper-making machine. *Id.* at ——, 728 F. Supp. at 754. As in this case, the question presented in *KMW Johnson* was whether the merchandise, which could not pos-

sibly be imported in one shipment, was properly classifiable under item 668.00, TSUS. After a thorough analysis of the history and policy surrounding the doctrine of entireties, the court found that "plaintiff has not demonstrated a sufficient reason why the court should not apply the well established principle of customs law that merchandise must be classified in its condition at the time of importation." *Id.* at ——, 728 F. Supp. at 758. The Court follows the ***KMW Johnson*** decision.

CONCLUSION

The Court holds that for the purposes of valuation of the merchandise, the sales for exportation to the United States were the transactions between Lurgi and its vendors. Consequently, the prices Lurgi agreed to pay for the components of the plant are the proper basis for calculating transaction value under 19 U.S.C. § 1401a(b) (1988). The Court affirms Customs' classification of the merchandise as individual components rather than as an entirety. There being no material questions of fact and the Court having determined that the plaintiff is entitled to judgment as a matter of law on the valuation issue, the plaintiffs' motion for summary judgment is granted in part and denied in part and the defendant's cross-motion for summary judgment is denied in part and granted in part.

This action is remanded to the Customs Service for reliquidation in accordance with this opinion. Any excess duties paid, together with interest as provided by law, is to be refunded to the plaintiffs.

(Slip Op. 90-49)

AMERICAN SCIENTIFIC PRODUCTS, DIV. OF AMERICAN HOSPITAL SUPPLY CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86-03-00274

MEMORANDUM OPINION

The United States Customs Service classified plaintiff's imported hematology analyzing equipment as "[e]lectrical measuring, checking, analyzing or automatically-controlling instruments and apparatus," under item 712.49, TSUS, dutiable at the rate of 6.2% *ad val.* Certain complementary printing component entered concurrently were also classified under item 712.49, TSUS. Plaintiff challenges these classifications, and asserts that the hematology equipment is properly classifiable as "[a]ccounting machines, computing, and other data-processing machines," under item 676.15, TSUS, with a duty rate of 4.3% *ad val.* Alternatively, plaintiff contends the hematology analyzers are classifiable under items 676.25 or 678.50, TSUS. The printers, plaintiff maintains, are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS, dutiable at the rate of 4% *ad val.* Parties move for decision on stipulated facts in lieu of trial.

Held: **The court concludes that Customs' classification of the hematology equipment as "[e]lectrical measuring, checking, analyzing or automatically-controlling instruments and apparatus," under item 712.49, TSUS, was proper and as such is af-**

firmed. Regarding the printing components, plaintiff has overcome the presumption of correctness that attaches to Customs' classification. The printers are properly classifiable as "[o]ffice machines not specially provided for," under item 676.30, TSUS.

[Judgment for plaintiff in part; judgment for defendant in part.]

(Decided May 14, 1990)

Katten Muchin & Zavis (*Mark S. Zolno* and *Lynn S. Baker*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mark S. Sochaczewsky*) for defendant.

TSOUCALAS, *Judge*. This action, designated as a test case, comes before the court pursuant to 28 U.S.C. § 1581(a) (1982) upon a challenge to Customs' classification of certain hematology analysis equipment imported from Japan. Plaintiff, American Scientific Product ("American"), contests the classification of its imported merchandise under item 712.49 of the Tariff Schedules of the United States (1985) ("TSUS"), on grounds that the equipment neither "measures" nor "analyzes" within the meaning of that TSUS provision. Rather, plaintiff claims, the equipment is provided for *eo nomine* under item 676.15, TSUS; or alternatively, under items 676.25 or 678.50, TSUS. *Plaintiff's Brief* at 16–19. Furthermore, plaintiff maintains the printers are covered by item 676.30, TSUS. *Id.* at 45. Defendant maintains that the equipment is properly classified under item 712.49, TSUS, as its function is to "analyze" within the meaning of that item.

BACKGROUND

The merchandise at issue was entered through Chicago between March 13, 1985 and April 2, 1985, and consists of three hematology analyzing machine models, described as microcellcounter CC–180 ("CC–180"), hematology analyzer CC–700 ("CC–700"), hematology analyzer E–5000 ("E–5000"); and one data printer model DP–450 ("DP–450"). Customs classified the machines as "electrical measuring, checking, analyzing or automatically-controlling instruments and apparatus" under item 712.49, TSUS, dutiable at the rate of 6.2% *ad valorem*. *Plaintiff's Brief* at 16. The printers were also classified under this provision based on the doctrine of "entireties."[1] *Plaintiff's Brief* at 46. The parties have submitted a joint stipulation of facts in lieu of trial detailing the features of the equipment ("Stipulation").

The CC–180, CC–700 and E–5000 are all referred to as "cell counters" or "analyzers" and operate in approximately the same manner. They are principally utilized in the diagnosis of blood disorders. *Plaintiff's Brief* at 17. The machines run a microliter of whole blood through a current of solution which is otherwise free of cells and count the number of individual blood cells which pass. They can cal-

[1]The doctrine of entireties dictates that components imported together, which are intended to be used as a unit, and whose individual identities are subordinated to that of the unit, will be dutiable as a unit. *See E.M. Stevens Corp.* v. *United States*, 49 Cust. Ct. 203, Abs. 66971 (1962).

culate the different types of cells and platelets present via electrodes that are attached to a tube which is extended into the blood sample mixed with solution. As each blood cell goes through the solution, it interrupts the current, thus stimulating the electrodes. *Stipulation* at 3–4. Through certain mathematical calculations, the sample results are then translated into standard volumetric units. *Id.* at 4.

Each machine houses microprocessors which utilize formulas to calculate the values necessary to determine certain hematology values, *i.e.*, the number of red blood cells, the number of white blood cells, hemoglobin, hematocrit, mean corpuscular volume, mean corpuscular hemoglobin, and mean corpuscular hemoglobin concentration. The CC–180 also calculates a parameter for the number of blood platelets. The E–5000 calculates those eight parameters, plus an additional seven more, all of which are computed by analyzing the volume and distribution of the displacement created by each cell's passage through the neutral solution. All the machines are designed to assure quality control and are able to discriminate between relevant and irrelevant information. The E–5000 is also able to discriminate between whole and fragmentary cells, show histograms, and access data without interrupting its current analysis. *Id.* at 3–7.

Although the analyzers can function without a printer, there exists a printing option for each of the machines, such that the researcher may either get the information off the screen, store it in a computer, or have it transcribed onto paper by way of the printer. *Id.* at 5, 8. The printer model at issue can be used in conjunction with various cell counter models. *Plaintiff's Brief* at 49.

DISCUSSION

Classification decisions of Customs are presumed to be correct. 28 U.S.C. § 2639(a)(1) (1982). The burden of proving otherwise rests upon the party challenging the decision. *Id.; Brookside Veneers, Ltd.* v. *United States,* 847 F.2d 786, 787–88 (Fed. Cir. 1988), *cert. denied,* 109 S. Ct. 369 (1988). The Court, however, must consider Customs' determination both independently and in light of plaintiff's alternatives. *Jarvis Clark Co.* v. *United States.,* 733 F.2d 873, 878, *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984). With this in mind, the court now turns to plaintiff's contentions.

Hematology Analyzers

The machines, plaintiff asserts, were erroneously classified under item 712.49, TSUS. Following is that provision as it appears in the tariff schedules:

Schedule 7, Part 2, Subpart D:

Electrical measuring, checking, analyzing, or automatically-controlling instruments and apparatus, and parts thereof:

* * * * * * *

712.49 Other .... 6.2% *ad val.*

Instead, plaintiff maintains the equipment is properly categorized under either items 676.15, 676.25, or 678.50, TSUS. These provisions appear as follows:

Schedule 6, Part 4, Subpart G:

Calculating machines; accounting machines, cash registers, postage-franking machines, ticket-issuing machines, and similar machines, all the foregoing incorporating a calculating mechanism:

676.15 Accounting, computing, and other data-processing machines .... 4.3% *ad val.*

* * * * * *

676.25 Other .... 4.3% *ad val.*

Schedule 6, Part 4, Subpart H:

678.50 Machines not specially provided for, and parts thereof .... 4% *ad val.*

Customs counters that the function of the machines is, as their name suggests, to "analyze" blood and they are therefore properly classified as "electrical measuring, checking, *analyzing* * * * instruments and apparatus." *Defendant's Brief* at 3 (emphasis added).

The common and commercial meanings of a term are generally afforded deference when determining its proper interpretation for tariff purposes. *Toyota Motor Sales (USA), Inc.* v. *United States,* 7 CIT 178, 182, 585 F. Supp. 649, 653 (1984), *aff'd,* 753 F.2d 1061 (Fed. Cir. 1985); *see Nippon Kogaku (USA), Inc.* v. *United States,* 69 CCPA 89, 673 F.2d 380 (1982). To determine a term's common meaning, the court may refer to dictionaries and other lexico-graphic authorities. *Mast Indus., Inc.* v. *United States,* 9 CIT 549 (1985), *aff'd,* 786 F.2d 1144 (Fed. Cir 1986).

"Analysis" is defined as the

> determination, which may or may not involve actual separation, of one or more ingredients of a substance either as to kind or amount; *also:* the tabulated result of such a determination; a statement of the amount or percent of each functional ingredient present in a mixture; a detailed examination of anything complex * * * made in order to understand its nature or to determine its essential features;

Webster's Third New International Dictionary 77 (1981) (emphasis in original); and the "determination of the elements of a compound, the proportions of the constituents, the proportion of a special ingredient, or the presence of impurities or adulterations," *Funk & Wagnalls New Standard Dictionary of the English Language* 101 (1942). The breadth of these definitions indicate that the term need not be limited solely, as plaintiff insists, to a pure biochemical anal-

ysis, *Plaintiff's Brief* at 32, and *may* indeed refer to sophisticated extrapolations similar to those performed by the analyzers at issue.

Further indication of the proper interpretation of TSUS provisions can be gleaned from the Nomenclature for the Classification of Goods in Customs Tariffs (1955) ("BN"), as it was instrumental in the compilation of the TSUS. *Tariff Classification Study Submitting Report* (1960). It is by now well established that courts may refer to the "BN" where there is "a nexus between the language of the Brussels Provision and that of its counterpart provision in the TSUS." *Phone-Mate, Inc.* v. *United States,* 12 CIT ——, ——, 690 F. Supp. 1048, 1052 (1988), *aff'd,* 867 F.2d 1404 (Fed. Cir. 1989); *see Toyota Motor Sales, supra.*

Instruments and appliances used in laboratories to test blood are generally classified under Heading 90.25 of the "BN". *Explanatory Notes to "BN"* 1575 (1978). Heading 90.25 of the "BN" states the following:

Section XVIII
Chapter 90
90.20/29

90.25 Instruments and apparatus for physical or chemical analysis (such as polarimeters, refractometers, spectrometers, gas analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like (such as viscometers, porosimeters, expansion meters); instruments and apparatus for measuring or checking quantities of heat, light or sound (such as photometers (including exposure meters), calorimeters); microtomes.

The superior heading of item 711.86, TSUS, (which, when supplemented with an electrical device is incorporated in item 712.49, TSUS) also lists "[p]olarimeters, refractometers, spectrometers, gas analysis apparatus and other instruments or apparatus for physical or chemical analysis" as included within the provision. The similarity in the language of respective provisions is highly probative of the legislative intent that they should coincide. *See Phone-Mate,* 690 F. Supp. at 1052. Similarly, the grouping within the provision analogous to "BN" Heading 90.25 of all analyzing equipment, without specifically excluding laboratory instruments that test blood, denotes congressional legislative intent to include a blood analyzer in item 712.49, TSUS.

Plaintiff alternatively argues that even if the hematology analyzers are classifiable under item 712.49, TSUS, they are nonetheless more specifically provided for in item 676.15. TSUS, or the accompanying provisions. It appears to be plaintiff's contention that the machines are actually data-processing machines "incorporating a calculating mechanism," within the meaning of those provisions. *Plaintiff's Brief* at 35. In support of this, plaintiff notes that calcu-

lating machines are "for performing arithmetical operations (such as multiplication) that are usu[ally] more complex than can be done on an adding machine." *Id.* at 21. Hence, since the hematology analyzers perform such functions, they are calculating machines within the meaning of the superior heading to item 676.15, TSUS, and should be classified accordingly.

Here again, the "BN" is probative of which merchandise was intended to be included in the corresponding TSUS provision. *Toyota Motor Sales,* 7 CIT at 185, 585 F. Supp. at 656. The corresponding "BN" heading is 84.52.[2] To be included in this category the machines must employ a calculating device. However, plaintiff's conclusion that these provisions "merely require that a machine perform certain arithmetical functions" in order to be included, is a manifest oversimplification. It bears noting that while a calculating device is the common thread among all the machines listed in the provisions, neither the TSUS nor the "BN" heading purport to encompass within these provisions *all* machines which employ a calculating mechanism.

A "calculating machine" covers, according to the Explanatory Notes to "BN," "a wide range varying from small pocket machines * * * to more complex machines" and includes these "even if they are designed and specialized for a particular purpose." *Explanatory Notes to "BN"* 1343. Consequently, predictors used for anti-aircraft or naval guns, tide predictors that, given certain data, are able to predict future ranges, bearings and tide heights, and other complex machines are included within "BN" Heading 84.52. *Id.* From this, plaintiff concludes that the hematology analyzers are also "complex machines" within the wide range of machines covered under that heading, and by analogy, under item 676.15, TSUS. Plaintiff, however, misunderstands this to mean that all machines which preform calculations for purposes other than the mere generation of numbers are sufficiently similar to those machines listed in "BN" Heading 84.52 to merit classification therein.

While the military and tide predictors, although more complex machines than those listed in the superior heading of item 676.15, TSUS, are classifiable under that provision, they are distinguishable from the hematology analyzers at issue here. Whereas the predictors are somewhat analogous to the calculating function *within* the hematology analyzers inasmuch as both merely process numbers which are provided by an earlier process, they are nonetheless only complex calculating machines—not analyzers incorporating a calculating function.

This concept is well established by *Burroughs Corp.* v. *United States,* 11 CIT 291, 664 F. Supp. 507 (1987), *aff'd,* 845 F.2d 321 (Fed. Cir. 1988), *cert. denied, sub nom. Unisys Corp.* v. *United States,* 109

[2]Heading 84.52, of the "BN" appears as follows:

84.52—CALCULATING MACHINES; ACCOUNTING MACHINES, CASH REGISTERS, POSTAGE-FRANKING MACHINES, TICKET-ISSUING MACHINES AND SIMILAR MACHINES, INCORPORATING A CALCULATING DEVICE.

S. Ct. 140 (1988). In *Burroughs*, the plaintiff asserted that a certain machine was not a calculating device or data processor under item 676.15, TSUS. The court held that an electronic calculator, which could compute loans, future-values and other banking transactions, fell within item 676.15, TSUS, even though "the preprogramming enables a user to perform mathematical tasks far beyond those of machines designed specifically for multiplication and division." *Id.* at 296, 664 F. Supp. at 512. The *Burroughs* court recognized that the calculations, albeit complex, were the ultimate function of the machines. Thus, in order to be classified under item 676.15, TSUS, the hematology analyzers must not simply employ a calculating device, but must also be similar in function to the machines specifically listed.

Conversely, the calculations performed by the data processing feature of the hematology analyzers are merely incident to the machines' main function of analysis. The analyzers are not "for" performing arithmetical functions merely because they perform such functions in the process of accomplishing a broader goal. Moreover, to find that the machines are merely data processors "employing a calculating mechanism" would not ony disregard their ultimate purpose, but would leave a major function of the analyzers unaccounted for.

Examination of the development of items 712.49 and 676.15, TSUS, offers further support for the grouping of the hematology analyzers within item 712.49, TSUS. Laboratory machines were once grouped together with calculating machines under paragraph 360 of the Tariff Act of 1922. 3 *Summaries of Tariff Information* 117–18 (1948). Under the Tariff Act of 1930, however, laboratory machines were kept in paragraph 360, which included pyrometers and moisture testers in one subsection, as well as other scientific and laboratory instruments in another, while calculating machines were separated into paragraph 353. Tariff Act of 1930, Pub. L. No. 361, 71st Cong. 2d Sess. (1930).

The present TSUS also separates laboratory machines into two subparts—those with an essential electrical element (item 712) and those without (item 711). Calculating machines are placed within an entirely different category—that of office machines (item 676). Tariff Schedules of the United States (1986). Headnote 2(a) of Subpart G specifically states that "the term '*office machines*' refers to machines which are used in offices, shops, factories, workshops, schools, depots, hotels, and elsewhere for doing work concerning the writing, recording, sorting, filing, mailing of correspondence, records, accounts, forms, etc." This provides further illustration of a clear legislative intent to categorize the machinery in accordance with their general function.

The Court finds further support for Customs' determination in *Burrows Equip. Co.* v. *United States*, 62 Cust. Ct. 681, C.D. 3848, 300 F. Supp. 455 (1969), where the court was faced with a challenge to

the government's classification of a vitascope under item 711.88, TSUS.[3] The vitascope, described by the court as "an instrument for determining the germinating capacity of seeds," involves a process that relies upon a chemical reaction which causes those seed germs capable of germinating to be dyed red. *Id.* at 683, 300 F. Supp. at 456. There, the plaintiff asserted that the vitascope merely stained the seed, without performing any chemical analysis.

The *Burrows* court concluded, however, that

> an instrument or apparatus *is included* with the common meaning of the term 'chemical analysis' if it determines one or more ingredients of a substance either as to kind or amount; or if it performs a detailed examination of a complex chemical substance for the purpose of enabling one to understand its nature or to determine an essential feature; or if it determines what elements are present in a chemical substance.

Id. at 686, 300 F. Supp. at 458 (emphasis in original). The vitascope was found to fall within the court's common meaning definition of "chemical analysis."

As in *Burrows*, plaintiff herein suggests that the hematology analyzers do not perform the type of analysis encompassed by the traditional definition of "analysis." Adopting the definitional guidelines established in *Burrows*, however, this Court finds that the function of the analyzers fits squarely within them.

Plaintiff's further attempt to shield the machines from classification as laboratory-type analyzers on the basis of their advanced technological status is equally unfounded. Clearly, although this particular type of hematology analyzer did not exist when the TSUS was created, its nature and function place it well within the scope of item 712.49, TSUS. *Texas Instruments Inc.* v. *United States*, 1 CIT 236, 244, 518 F. Supp. 1341, 1346 (1981) (where the court held that tariff schedules "are written for the future as well as for present application and may embrace merchandise unknown at the time of their enactment" as long as such merchandise possesses an essential resemblance to the characteristics as described by the applicable tariff provision), *aff'd*, 69 CCPA 136, 673 F.2d 1375 (1982).

Similarly, the analyzers cannot realistically be called data-processors because although, as plaintiff notes, the data-processing function of the hematology analyzers is essential to the analysis of blood, it is nonetheless only a component of a machine whose overall purpose is to analyze. The machines' functions are to break blood up into its parts, quantify each, and determine the various qualities. Since they determine "one or more ingredients of a substance either as to kind or amount," *Burrows* at 685, 300 F. Supp. at 458, this Court finds that the imported machines "analyze" within the meaning of items 711.86 and 712.49, TSUS. As such, Customs'

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[3]Item 711.88, TSUS, is an "other" provision which comes under the same superior heading as item 712.49, TSUS.

classification of the hematology analyzers under item 712.49, TSUS, was appropriate.

Printers:

In addition, plaintiff contests Customs' classification of the data-printers also under item 712.49, TSUS, based on the "entireties" doctrine. In support of this claim, plaintiff notes that the printers are an optional component, not necessary for the operation of the machines. *Stipulation* at 8.

Articles are dutiable in the condition in which they are imported. *Donalds Ltd., Inc.* v. *United States,* 32 Cust Ct. 310, 314, C.D. 1619 (1954). Moreover, it is beyond dispute that the doctrine of "entireties" is inapplicable where the imported components retain their individual identities. *Id.* at 315; Sturm, *Customs Law & Administration,* § 54.11. Examination of the stipulated facts as well as the advertising literature confirms that the analyzers function independently, although they are adaptable to use with a variety of printer models. *See E-5000 Advertising Manual* at 17. Moreover, that only fifteen sets of printers were imported in an entry of approximately forty analyzers further bolsters plaintiff's claim. *See Demuth Steel Prod. Co.* v. *United States,* 13 CIT ——, 688 F. Supp 632 (1988). Finally, there is no indication that the printers are considered an integral part of the hematology analyzers. *Donalds,* at 314.

Hence, plaintiff has overcome the presumption of correctness attaching to Customs' classification. 28 U.S.C. § 2639(a)(1). The data-printers are thus properly classified under item 676.30, TSUS, as "office machines."

Conclusion

In view of the foregoing, the Court hereby concludes that since the analyzers perform a detailed examination of the blood, their function fits plainly within the meaning of "analysis" as applicable under item 712.49, TSUS. Customs' classification of the hematology analyzers as "checking, analyzing, or * * * instruments" was therefore proper, and is affirmed. The presumption of correctness attaching to Customs' classification of the "DP-450" data-printers has been overcome by plaintiff. They are provided for under item 676.30, TSUS, as "office machines" and are to be reliquidated as such.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/127 5/2/90 Restani, J.	Erem Corp.	89-4-00214	10% marking duties assessed	Refund marking duties	Agreed statement of facts	Los Angeles Tweezers and pliers
C90/128 5/4/90 DiCarlo, J.	Minolta Corp.	83-9-01333	410.22 Various rates	408.41 Various rates	Tomoegawa U.S.A., Inc. v. U.S., S.O. 88-17 (1988)	Los Angeles Developer, etc.
C90/129 5/7/90 Aquilino, J.	Americana Creations	84-1-00008	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/130 5/7/90 Aquilino, J.	D & M Watch Corp.	83-12-01775	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/131 5/7/90 Aquilino, J.	Jawhar Trading Corp.	84-3-00428	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/132 5/4/90 DiCarlo, J.	Minolta Corp.	83-8-01144	406.50 20%	405.20 3c per lb. + 19%	Tomoegawa U.S.A., Inc. v. U.S., S.O. 88-17 (1988)	New York Starter and toner

C90/133 5/7/90 Aquilino, J.	Kwanasia of America Inc.	83-8-01245	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/134 5/7/90 Watson, J.	Supreme Int'l Corp.	86-7-00552	381.3132 32.1%	381.3573 8%	Agreed statement of facts	Miami Men's guayabera shirts
C90/135 5/8/90 Aquilino, J.	S.W.I. Trading	84-1-00011	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/136 5/8/90 Aquilino, J.	Delta Impex Watch Corp.	83-9-01287S	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/137 5/9/90 Re, C.J.	Dynasty Footwear	84-7-00975	700.95 12.5% 700.35 8.5%	700.45 10%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	Los Angeles Leather trimmed shoes
C90/138 5/9/90 Re, C.J.	J.C. Penney Purchasing Corp.	88-3-00217	700.95 12.5%	700.45 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87-136 (1987)	Los Angeles Footwear
C90/139 5/10/90 Aquilino, J.	D & M Watch Corp.	83-9-01289	716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/140 5/10/90 Aquilino, J.	Delta Impex Watch Corp.	84-1-00128	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/141 5/11/90 Re, C.J.	Fathom/H.I.M., Inc.	86-12-01493	376.56 Various rates	A735.20 Free of duty	Agreed statement of facts	Tampa Wetsuits
C90/142 5/11/90 Watson, J.	Belwith Int'l Corp.	89-6-00327	534.94 Various rates	727.55 or 727.55 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs
C90/143 5/11/90 Aquilino, J.	Satellite Electronics	85-2-00167	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/144 5/11/90 Aquilino, J.	Satellite Electronics Inc.	85-5-00729	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/145 5/11/90 Aquilino, J.	Satellite Electronics	85-8-01119	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/146 5/11/90 Aquilino, J.	Satellite Electronics	86-6-00772	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v.	New York Watches, etc.

					U.S., 673 F.2d 1375 (1982)	
C90/147 5/11/90 Aquilino, J.	Satellite Electronics	86-7-00860	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/148 5/11/90 Aquilino, J.	Satellite Electronics	86-11-01399	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/149 5/11/90 Aquilino, J.	Satellite Electronics	87-9-00940	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.
C90/150 5/11/90 Aquilino, J.	Satellite Electronics	88-3-00245	716.09-716.45, 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Watches, etc.

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V90/26 5/2/90 Watson, J.	Garland Commercial Industries, Inc.	89-2-00089	Transaction value	At invoice unit vrlues, Canadian dollars, net packed as set forth on invoices	Agreed statement of facts	Buffalo Commercial cooking equipment
V90/27 5/2/90 Watson, J.	Garland Commercial Industries, Inc.	89-5-00263	Transaction value	At invoice unit values, Canadian dollars, net packed as set forth on invoices	Agreed statement of facts	Buffalo Commercial cooking equipment

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